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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 466

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

BRIEF OF APPELLANTS.

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Dated February 27, 1929.
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TABLE OF CONTENTS.

	Page
History of the rate adjustment involved	3
The situation at Kansas City	3
The situation at Wichita	9
Publication by appellants of inbound proportional rates to retain long haul upon their originated traffic	11
Proceedings before the Interstate Commerce Commission	13
Proceedings in the District Court	18
Specification of assigned errors intended to be urged	21
Summary of Argument	24
Argument	25
The order of Division 4 of the Interstate Commerce Commission of July 26, 1927, was null and void because it requires appellants without their consent to embrace in through routes substantially less than the entire length of their railroads between the termini of such through routes, contrary to the provisions of paragraph (4) of Section 15 of the Interstate Commerce Act	25
Division 4 of the Interstate Commerce Commission erred in finding that if through routes already exist appellants were precluded from withdrawing from participation in such through routes	34

Division 4 of the Interstate Commerce Commission and the District Court erred in holding the reasonableness of any rate of appellants was in issue in I. & S. Docket No. 2813, and that the Commission might pass upon the reasonableness of a rate via a route which the Commission could not lawfully institute under paragraph (4) of Section 15 of the Interstate Commerce Act 41

The order of Division 4 of the Interstate Commerce Commission was made without competent evidence to support it 52

Conclusion 53

TABLE OF CASES CITED.

Grain and Grain Products from Colorado, Kansas and Nebraska to Gulf Ports for Export, 129 I. C. C. 261 2

Grain and Grain Products from Kansas and Missouri to Gulf Ports, 115 I. C. C. 153 ..... 52, 53

Hughes Creek Coal Company v. K. & M. Ry. Co., 29 I. C. C. 671 48

Interstate Commerce Commission v. Northern Pacific Ry. Co., 216 U. S. 538 ..... 28, 34

Kansas City Board of Trade v. A. T. & S. F. Ry. Co., et al., 69 I. C. C. 185 4

Lemon-Cove Woodlake Assn. v. A. T. & S. F. Ry. Co., 139 I. C. C. 239 46

Little Rock and M. R. Co. v. East Tennessee, V. & G. R. Co., et al., 47 Fed. 771 25

Marble Rates from Vermont Points, 29 I. C. C. 607 .. 38

Market Co. v. Hoffman, 101 U. S. 112 44

Ocean-and-Rail Rates to Charlotte, N. C., 38 I. C. C. 405 ..... 38, 39

Ogden Gateway Case, 35 I. C. C. 131 ... 36, 38, 39, 45, 48

Peck, et al., v. Jenness, et al., 7 Howard 611 44

Port of New York Authority v. A. T. & S. F. Ry. Co., 144 I. C. C. 514 ..... 46, 49, 50, 51

Restrictions in Routings Over S. L. & U. R. R. Co., 115 I. C. C. 357 39

Restriction in Routing of Traffic from Pacific Northwest Points, 73 I. C. C. 305 ..... 38, 46

Routing on Coal from Western Maryland Mines to Eastern Destinations, 66 I. C. C. 103 ..... 38, 48

Routing on Sheep from K. C. M. & O. Points, 69 I. C. C. 4 ..... 45, 48

St. Louis S. W. Ry. Co. v. United States, 245 U. S. 136 ..... 17, 34

Southern Pacific Co., et al., v. Interstate Commerce Commission, 200 U. S. 536 27

United States v. Lexington Mill Co., 232 U. S. 399 .. 45

United States v. Missouri Pacific R. R. Co., 73 L. Ed. 136 31

Virginian Railway Co. v. United States, 272 U. S. 658 ..... 17, 20, 34, 40, 43

West Coast Lumber Manufacturers Assn. v. S. P. & S. Ry. Co., 45 I. C. C. 230 ..... 38, 39

Wichita Board of Trade v. A. & S. Ry. Co., et al., 29 I. C. C. 376 33

Table of Statutes Cited.

Act to Regulate Commerce of February 4, 1887, 25 Statutes at Large 379 25

Amendment to Interstate Commerce Act of June 29, 1906, Chap. 3591, Section 4, 34 Statutes at Large 584 27

Amendment to Interstate Commerce Act of June 18, 1910, Chap. 309, Section 12, 36 Statutes at Large 539 28

Transportation Act of 1920, 41 Statutes at Large 456 30

Paragraph (3) of Section 15 of the Interstate Commerce Act 30

Paragraph (4) of Section 15 of the Interstate Commerce Act 2, 30

Urgent Deficiencies Act of October 22, 1913, 38 Statutes at Large 219 1

Note: An opinion was delivered in the court below but has not been reported in the official reports.

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Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

BRIEF OF APPELLANTS.

This is an appeal from a decree of the United States District Court for the Northern District of Illinois (constituted as provided in the Urgent Deficiencies Act of Oct. 22, 1913 (38 Stats. 219)), which dismissed a bill filed in behalf of The Atchison, Topeka and Santa Fe Railway Company, The Chicago, Rock Island and Pacific Railway Company, and Missouri Pacific Railroad Company, to annul an order of Division 4 of the Interstate

(NOTE: All references thus (R. ....) are to pages of the Transcript of Record.)

(All Italics are ours.)

Commerce Commission dated July 6, 1927, entered in the proceeding known as *Investigation and Suspension Docket No.* 2813, *Grain and Grain Products from Colorado, Kansas, and Nebraska to Gulf Ports for Export*, reported in Volume 129, Interstate Commerce Commission Reports, at page 261.

Appellants in this proceeding, who were respondents in I. & S. Docket No. 2813, on or about August 8, 1927, filed their petition with the Interstate Commerce Commission for a rehearing and reargument before the entire Commission of the issues decided by Division 4 thereof in I. & S. Docket No. 2813 and for a vacation and postponement of the order therein, but the Commission, on October 3, 1927, denied respondents' petition for a rehearing and reargument (R. 10). The order of Division 4 in I. & S. Docket No. 2813 required appellants to cancel certain proportional rates upon grain and grain products from stations on their lines of railroad in Kansas, Colorado, and Nebraska to Kansas City, Mo.-Kans., and Wichita, Kans., applicable only when said grain or grain products moved from Kansas City and Wichita to various Gulf ports for export via certain other lines of railroad. The effect of the order of Division 4 was to short haul appellants upon traffic originated by them and require them to participate in through routes and through rates contrary to the provisions of Paragraph (4) of Section 15 of the Interstate Commerce Act (49 U. S. Code 424).

History of the Rate Adjustment Involved.

The Situation at Kansas City.

From country points of origin in Kansas and Colorado the appellants, who will be hereafter referred to as the Santa Fe, Rock Island, and Missouri Pacific, have generally two routes to ports on the Gulf of Mexico in the States of Texas and Louisiana such as Galveston, Houston and New Orleans. One route is via Kansas City, Mo., and the other is a shorter, more direct route to such ports not passing through Kansas City (R. 70, 127). Prior to the year 1924 the rates upon grain and grain products from such country stations in Kansas and Colorado to Gulf ports for export were generally lower via the direct routes than via routes through Kansas City, Mo. (R. 121). To illustrate: from Dodge City, Kansas, upon the Santa Fe, the rate to Galveston, Texas, upon wheat or its products via the direct line of the Santa Fe was 47 cents, but if the movement were from Dodge City to Galveston, Texas, via Kansas City, using the line of the Santa Fe all the way, the total charges would be 51 cents, comprised of a local rate from Dodge City to Kansas City of 20.5 cents plus a proportional rate from Kansas City to Galveston of 30.5 cents (R. 75).

The nature of the rates above described may be explained as follows: A local rate, or flat rate as it is sometimes called, is one applicable between two points on any shipment originating at the point from which the rate is named and terminating at the destination point to which such rate is named. Such a local, or flat, rate is the rate referred to of 20.5 cents upon wheat from Dodge City, Kansas, to Kansas City, Missouri.

A proportional rate is one applicable upon a shipment

which has had a prior movement, or upon a shipment as to which a future movement is contemplated, and may be said to constitute a rate covering a part of the aggregate charges for any shipment. Such a rate was defined in *Kansas City Board of Trade* v. *The Atchison, Topeka and Santa Fe Railway Company, et al.*, 69 I. C. C. 185, as follows:

> "We have in numerous cases considered reshipping and proportional rates, by whatever name called, and it is well settled that they are inseparably connected with and form parts of the rates applying to through transportation. A proportional rate means a part of, or the remainder of, a through rate, or it means nothing at all."

Such a proportional rate is the proportional rate of 30.5 cents upon wheat referred to from Kansas City to Gulf ports for export. That rate applies only on shipments having their origin beyond Kansas City.

A through rate is generally defined as the aggregate charge from a point of origin to a point of destination and may be stated either in one figure or may consist of the aggregate of a combination of local rates, or local and proportional, or proportional and proportional rates.

Where there is a one figure through rate from origin to destination applicable over several lines of railroad, the amount of which rate is divided by agreement or order of the Interstate Commerce Commission between the several participants in such rate, the rate is referred to as a joint through rate. When a proportional rate is published from one point applicable upon all traffic originating beyond, without regard to particular point of origin, the concurrence of the inbound lines to the proportional rate outbound is not secured by the lines naming the outbound proportional rate.

In 1924 the rate situation above described was modi-

fied. First, the Missouri Pacific, and subsequently the Santa Fe and the Rock Island, placed Kansas City, Mo., in direct line of transit from certain of their country stations in Kansas and Colorado on traffic to the Gulf ports for export. The milling or stopping in transit privilege may be described as the privilege granted by a carrier to stop a shipment at any given point, upon payment of the inbound local rate to such point, for the purpose of, in the case of grain, storing, cleaning, clipping, elevating, or milling into products, and subsequently shipping such grain or products to a final point of destination, at a charge representing the difference between the charge paid inbound to the transit point and the through charge from first point of origin to final destination (R. 3, 4). The effect, therefore, of placing Kansas City in direct line of transit on export shipments to the Gulf was to apply through that point the lower direct rate hereinbefore referred to applicable from such country points of origin direct to Gulf ports for export. There thus became available from Kansas City via the lines of appellants an outbound charge upon grain originating on their lines lower than the proportional rate of 30.5 cents before referred to. To illustrate: using Dodge City, Kansas, again as the point of origin, wheat moved from that point into Kansas City, Mo., via the Santa Fe, would pay 20.5 cents per 100 pounds. Upon its subsequent movement out of Kansas City to Galveston, Texas, for export, via the Santa Fe, it would pay the difference between the inbound charge of 20.5 cents and the total through rate of the Santa Fe from Dodge City to Galveston of 47 cents, or what is commonly referred to as a transit balance of 26.5 cents. This transit balance was thus 4 cents lower than the proportional rate applying from Kansas City to Gulf ports of 30.5 cents (R. 4, 5). The above example is typ-

ical of similar transit arrangements established via the Missouri Pacific and Rock Island.

These transit balances differed in amounts less than the proportional rate of 30.5 cents, dependent upon the amount of the inbound charge to Kansas City and the amount of the rate from the particular point of origin direct to the Gulf port.

As the Santa Fe, Missouri Pacific, and Rock Island have in the past, relying upon their legal rights, consistently refused to enter into joint rate arrangements from country stations in Kansas and Colorado to the Gulf for export via Kansas City and other connecting lines, the transit balances above described were and are available only via whichever of said lines brought the grain into Kansas City. There would thus be available over such lines as The Chicago and Alton Railroad Company and The Kansas City Southern Railway Company, which terminate at Kansas City and have no lines extending into the grain producing territory in Kansas and Colorado, only the higher proportional rate of 30.5 cents for reshipment from Kansas City to the Gulf via their lines.

Thereupon, those companies, in order to attract to their lines grain originating on the lines of appellants, published a line of varying proportional rates upon grain originating on appellants' lines, such rates varying in amount dependent upon the origin of the grain, which rates in each instance were in such amount that the inbound local rate to Kansas City plus the outbound varying proportional rate would equal the amount of the direct through rate from country origin to Gulf port maintained either by appellants or by appellants and connections (R. 5). The effect also was that the varying proportional rate on grain originating at a particular sta-

tion would exactly equal the transit balance of whichever of appellants brought such grain into Kansas City. As an illustration, Dodge City, Kansas, will again be selected. From Dodge City, Kansas, to Beaumont, Texas, the rate of appellant Santa Fe upon export wheat is 47 cents, and the local rate of the Santa Fe from Dodge City to Kansas City is 20.5 cents. The varying proportional rate published by the Kansas City Southern to Beaumont, Texas, on wheat originated by the Santa Fe at Dodge City, Kansas, is 26.5 cents, which exactly equals the transit balance of 26.5 cents heretofore referred to applicable via the line of the Santa Fe on wheat originated by it at Dodge City, Kansas, and by it accorded transit at Kansas City. However, the transit balance of the Kansas City Southern to Beaumont on wheat originated at Wichita on the Santa Fe is 26 cents instead of 26.5 cents, because the direct rate of the Santa Fe from Wichita to Beaumont is 44 cents, and the local rate from Wichita to Kansas City is 18 cents, making a transit balance available via the Santa Fe of 26 cents, which was equaled by the varying proportional rate of the Kansas City Southern (R. 6).

The Missouri-Kansas-Texas Railroad Company and the St. Louis-San Francisco Railway Company, although having lines beyond Kansas City in Kansas, do not reach the grain fields to the extent that the Santa Fe, Missouri Pacific, and Rock Island do, and the first named two lines also published varying proportional rates of similar nature to those above described, but to a more limited extent.

Appellants, upon being advised of the publication of the varying outbound proportional rates above referred to by each and all of said lines, vigorously protested their publication to the Interstate Commerce Commission, but the Commission refused to exercise its power of suspen-

sion, and permitted said rates to become effective (R. 5). Thus, although appellants had continually and consistently refused to enter into joint rate arrangements with the varying proportional rate lines, and still do, and although the Interstate Commerce Commission would have had no authority to require appellants to enter into such arrangements, such lines, by the device of the varying proportional rate, accomplished, without the consent of appellants or any of them, and over their vigorous protest both to such lines and to the Interstate Commerce Commission, exactly the same result.

To understand the situation, it should be borne in mind that there is principally involved at Kansas City only grain that has moved into that point and been unloaded into elevators, with destination at the time of shipment unknown, and which grain is subsequently reshipped to some Gulf port for export. Grain purchased at country stations for shipment for export via Gulf ports would be moved directly to such ports, and would not move via Kansas City on account of the longer routes. The lines publishing the varying proportional rates contend that the grain in storage at Kansas City is free grain; that the inbound charges having been paid, and the grain having been delivered to elevators, the inbound lines have no further interest in its movement and it may thus be taken out by any line without in any way depriving the origin lines of their rights under Section 15 of the Interstate Commerce Act.

That argument, however, is unsound, because by reason of the nature of a proportional rate, it contemplates a through movement, the proportional rate being charged for a part or remainder of the movement. The proportional rate as such can be legally sustained only through the fiction of a through or continuous movement, and there is certainly involved a continuous through move-

ment under the varying proportional rates of the outbound lines when these rates vary in amount dependent upon the particular origin of the grain, and in each instance represent the remainder of a through rate from each such particular origin.

For the information of the court, there is attached hereto, as an appendix, a map which will aid in illustrating the issues. The lines of appellants Rock Island, Santa Fe and Missouri Pacific, both to and beyond Kansas City and Wichita, are colored green, red, and yellow, respectively, and the lines naming the outbound varying proportional rates from those points are shown in black.

The Situation at Wichita.

At Wichita the situation is somewhat different from that at Kansas City. In the case of Wichita also, the appellants, Santa Fe, Missouri Pacific, and Rock Island, have in the past continually refused to enter into arrangements with the Kansas City, Mexico & Orient Railway Company and its connections for joint through rates from country origins on the lines of the first named carriers to Gulf ports for export via Wichita. In that case, also, it is clear that the Commission could not have issued an order establishing joint rates and thus compelling appellants to surrender their originated traffic to connections at Wichita when they had either their own single line to the Gulf or their own line and connections affording them a haul over substantially the entire length of their systems (R. 7).

The situation at Wichita differs from that at Kansas City in that there have never been any proportional rates from Wichita to the Gulf applicable on grain originating beyond. The only basis ever existent via lines of appellants to Wichita and beyond via the Midland Valley or

Orient and their connections was a through combination of local rates to and from Wichita (R. 8).

In 1926 the Midland Valley Railroad Company and the Kansas City, Mexico & Orient Railway Company, in concurrence with connections named in their tariffs, published varying proportional rates from Wichita, Kansas, to Galveston, Houston, and Texas City, Texas, upon grain for export originating at local stations on the lines of appellants, each of such proportional rates being in such amount that it equalled the difference between the inbound charge from the country station to Wichita via the lines of appellants, or any of them, and the amount of the direct through rate from such country station to the Gulf port maintained by appellants, and, also, in each instance equalled the transit balance available over whichever of the lines of appellants that brought the grain into Wichita. There thus became available via the Midland Valley and its connections and via the Kansas City, Mexico & Orient and its connections through rates of exactly the same amount as maintained by appellants from particular points of origin in the country for direct movement or a transit balance of the same amount as afforded by the lines of appellants after the grain had been stopped at Wichita. The situation at Wichita is different also in that the lines publishing the outbound varying proportional rates are in position to solicit direct shipments from country points of origin as well as outbound movement of stored grain at that point, for the reason that the direct routes to the Gulf via the lines of appellants in many cases passed through Wichita and the shipments could be routed from the first point of origin with instructions to deliver either to the Midland Valley or to the Orient at Wichita for further movement.

PUBLICATION BY APPELLANTS OF INBOUND PROPORTIONAL RATES TO RETAIN LONG HAUL UPON THEIR ORIGINATED TRAFFIC.

To meet the situation brought about by the publication of the varying proportional rates from Kansas City and Wichita, appellants duly filed with the Interstate Commerce Commission, to become effective December 15, 1926, and at later dates, tariffs naming rates on grain and grain products from their stations in Kansas, Colorado, and Nebraska, to Kansas City, for application when the outbound movement from Kansas City to Gulf ports for export was via the lines of the Kansas City Southern Railway Company and its connections, or The Chicago and Alton Railroad Company and its connection, or the Missouri-Kansas-Texas Railroad Company, or the St. Louis-San Francisco Railway Company and its connections, in such amounts that such rates, plus the outbound varying proportional rates of aforesaid lines, would equal the sum of the local rate from each of the stations of appellants in Kansas and Colorado to Kansas City, plus the standard proportional beyond, thus attempting to restore the rate basis in effect via Kansas City prior to the publication of the outbound varying proportional rates. As an illustration: Appellant, Santa Fe, published an inbound proportional rate upon wheat from Dodge City, Kansas, to Kansas City of 24.5 cents, which, added to the varying proportional rate of 26.5 cents published to Texas and Louisiana ports on wheat originating at Dodge City, produced a through rate of 51 cents, or the equivalent of the local rate from Dodge City to Kansas City of 20.5 cents, plus the standard proportional rate of 30.5 cents from Kansas to such Gulf ports. Such action was taken by appellants to confine to their own lines of railroad the outbound movement

from Kansas City to Gulf ports for export on grain and grain products originated on their lines of railroad for movement via such lines of railroad into Kansas City, by maintaining via their own lines a lower rate basis than in effect via their own lines and the lines naming the outbound varying proportional rates.

So also to render ineffective the action of the lines naming varying proportional rates from Wichita, and to hold to their own lines such traffic, these appellants published from stations on their lines in Kansas and Colorado to Wichita, inbound proportional rates upon grain and grain products generally 5 cents higher than the local rate for application when the movement of such grain or products beyond Wichita was via either the Kansas City, Mexico and Orient or the Midland Valley and their connections, thus in that case attempting to maintain via their own routes a lower rate basis than via routes which would short haul them at Wichita.

Grain and grain products between points in Kansas generally move upon a mileage scale, and appellants accomplished the increase by publishing a mileage scale to Wichita for application when the outbound movement was via the Orient or Midland Valley, generally 5 cents higher than the mileage scale applicable for local or other movements in Kansas. Therefore, inasmuch as the varying proportional rates of the Midland Valley and the Kansas City, Mexico and Orient were based upon the difference between the rates to Wichita produced by the standard scale and the through rate from point of origin, the application of the proportional rate scale would result uniformly in through rates from points of origin, when the movement was via either the Orient or the Midland Valley, 5 cents higher than when the through movement was via the lines of appellants and their connections, affording them long hauls, or would result in a

transit balance at Wichita on grain stopped at that point, of 5 cents higher than the balance applicable over the lines of appellants and their connections.

Proceedings Before the Interstate Commerce Commission.

Upon the protest of the lines naming the outbound varying proportional rates and others, the inbound proportional rates of appellants to Kansas City and Wichita were suspended by the Interstate Commerce Commission, and in its opinion of July 6, 1927, the Commission, by Division 4 thereof, in its Investigation and Suspension Docket No. 2813, found that those rates were not justified, and by order of the same date their cancellation was required on or before August 25, 1927. As heretofore pointed out, a petition of these appellants for reargument and reconsideration by the entire Commission was subsequently denied. By various orders issued from time to time upon application of appellants, the final effective date of said order of July 6, 1927, has been postponed until August 9, 1929. The appellants have in each instance given their consent to the further continuance of the temporary suspension orders of the Commission beyond the statutory limit of such temporary suspensions.

The opinion of Division 4 of the Interstate Commerce Commission, reported in 129 Interstate Commerce Commission Reports 261, and appearing in the printed record herein at pages 19 to 24, is as follows, the syllabus and appearances being omitted. The order accompanying said opinion, and appearing at page 24 of the record herein, is also omitted:

> "Exceptions were filed by respondents and by the Southern Kansas Millers Club, Galveston Chamber of Commerce, and Houston Chamber of Commerce to the report proposed by the examiner and oral argument has been had.

By schedules filed to become effective December 15, 1926, and later dates, respondents, the Missouri Pacific, Santa Fe, and Rock Island, propose to establish proportional rates on grain and grain products from stations on their lines in Colorado, Kansas, and Nebraska to Kansas City, Mo.-Kans., and from points on their lines in Kansas to Wichita, Kans., destined to Gulf ports for export, for application when the movement from Kansas City is over the Kansas City Southern, Chicago & Alton, Missouri-Kansas-Texas, or Frisco and their connections and the movement from Wichita is over the Kansas City, Mexico & Orient or Midland Valley and their connections. The proposed rates are in excess of the corresponding local rates and would result in increases in the through rates over these routes by amounts ranging from 0.5 to 7.5 cents. Upon protest of the Kansas City Southern, Chicago & Alton, Midland Valley, Wichita Board of Trade, Board of Trade of Kansas City, and others, operation of the schedules was suspended to May 14, 1927, and has been voluntarily postponed by respondents to September 11, 1927. Rates are stated in cents per 100 pounds. The rate situation was and is the same in principle with respect to traffic via Kansas City and traffic via Wichita. We shall discuss only the Kansas City situation, to which most of the evidence and oral argument relate.

Prior to 1924, grain from this origin territory to the Gulf ports for export moved via Kansas City at combinations of the local rates to that point and a proportional rate of 30.5 cents beyond, the latter hereinafter referred to as the standard proportional. In 1924, to meet the competition of the rail-and-lake routes via Chicago to Montreal, the Missouri Pacific established lower through one-factor rates via Kansas City, with transit thereunder at that point. Thereafter, apparently because of carrier competition, the Rock Island and Santa Fe did likewise. Such rates apply only over routes which give respondents a long haul from Kansas City. The charges of respondents for the movement from Kansas City, which were the balances of their through rates after deduction of the inbound local rates, then

became lower than the standard proportional charged by the other lines. The differences in the charges were substantial and manifestly sufficient to confine the movement beyond Kansas City to respondents' lines. This placed the carriers whose lines terminate at Kansas City and do not reach the grain fields at a distinct disadvantage. They were formerly on an equality with respondents on traffic from Kansas City to the Gulf ports, as all charged the standard proportional. To place themselves in a position to participate in the traffic beyond Kansas City, the Kansas City Southern, Chicago & Alton, Missouri-Kansas-Texas and Frisco and their connections established so-called 'varying proportionals' or 'balance' rates from Kansas City to the Gulf ports. They are called 'varying proportionals' or 'balance' rates because they vary in amount, dependent upon the point of origin of the traffic, and equal the balances of respondents' through one-factor rates after the local inbound rates are deducted. To offset the effect of these varying proportionals, respondents filed the suspended schedules, which provide inbound proportional rates that, when added to the outbound varying proportionals, equal the former combination of the local inbound rates and the standard proportional. In other words, the proposed inbound proportional rates are higher than the inbound local rates by the same amounts the outbound varying proportionals are lower than the standard proportional. The following will illustrate the situation:

The local rate from Dodge City, Kans., to Kansas City is 20.5 cents and the outbound standard proportional 30.5 cents, a total of 51 cents. The through one-factor rate maintained by the Santa Fe from Dodge City, to Galveston, Texas, via Kansas City, with transit at that point, is 47 cents leaving an outbound transit balance of 26.5 cents. The varying proportional rate from Kansas City on grain originating at Dodge City is also 26.5 cents, which, added to the local inbound rate, equals the Santa Fe's through one-factor rate of 47 cents. The suspended inbound proportional is 24.5 cents, which added to the outbound varying proportional, equals the for-

mer combination of 51 cents. The distances from Dodge City to Galveston are 900 miles over the Santa Fe direct, 1,254 miles over the Santa Fe via Kansas City, and 1,187 miles over the Santa Fe to Kansas City and the Kansas City Southern and connections beyond.

The lawfulness of the rates over all routes via Kansas City is before us in No. 17159 and sub numbers.

Respondents' principal justification of the proposed inbound proportionals is that under section 15 (4) of the interstate commerce act they are entitled to, and we are without power to deny to them, the long haul on traffic which they originate. They contend that through routes do not exist over their lines to Kansas City in connection with the lines maintaining the varying proportional rates beyond because there is no common arrangement, express or implied, between the various carriers for through carriage. They further contend that, as the routes via Kansas City which preserve their long haul are not unduly circuitous and the service over the same is adequate, they have an absolute right to the outbound haul from Kansas City on grain originated by them; that their rights to the long haul have been and are being defeated by the varying proportional rates from Kansas City; and that they are entirely within their rights in seeking to retain the long haul by establishing the suspended inbound proportionals. They also contend that even if it be considered that through routes exist over their lines in connection with the lines maintaining the varying proportionals, we are without authority to prohibit them from withdrawing from such routes, inasmuch as we would not be warranted in compelling the establishment of such routes if they did not exist.

We cannot agree with respondents that through routes over their lines to Kansas City in connection with the lines maintaining the varying proportional rates beyond do not now exist. For many years Kansas City has been one of the most important primary grain markets and the rates through that market very generally have been combinations of rates to and from that point. As heretofore stated,

prior to 1924 the applicable rates under which this traffic moved via Kansas City were combinations of the inbound locals and the outbound standard proportional, the latter applicable over the lines now maintaining the varying proportionals as well as over respondents' lines. A through route is an arrangement, express or implied, between connecting railroads for continuous carriage from a point on the line of one to a destination on the line of another. A joint rate is not essential. The through rate may as well be a combination of locals or proportionals. *St. Louis S. W. Ry. Co.* v. *United States*, 245 U. S. 136, 139, note 2, and *Virginian Ry.* v. *United States*, 272 U. S. 658, 666. There is no question in our minds but what there have been and are at least implied arrangements for the through carriage of this traffic sufficient to constitute all of these routes through routes within the meaning of the act, and their status would not be affected by the suspended inbound proportionals here considered.

There remains to determine only the question of whether respondents have sustained the burden of justifying the proposed inbound proportional rates which, as heretofore stated, are higher than the corresponding local rates by amounts ranging from 0.5 to 7.5 cents and would increase the through rates over certain of the existing through routes by similar amounts. Respondents have made no attempt to justify the proposed inbound proportional rates in and of themselves. The routes via Kansas City over which the proposed inbound proportional rates would increase the through charges are in many instances shorter than the routes via that point over which the rates would not be increased. The only justification offered by respondents for an increase in the rates over such routes is their desire to retain the long haul, which, under the circumstances shown, is not sufficient. They have not sustained the burden upon them of showing that the increased through rates over the routes referred to would be reasonable and otherwise lawful.

We find that the suspended schedules have not been justified. An order will be entered requiring their cancellation and discontinuing this proceeding."

PROCEEDINGS IN THE DISTRICT COURT.

On November 30, 1927, appellants filed their petition and bill for injunction in the United States District Court for the Northern District of Illinois, praying that the order of the Commission be annulled, and further praying that the court issue a temporary injunction restraining the execution of the order pending final hearing on the bill (R. 1). Answers were filed by the United States (R. 25), by the Interstate Commerce Commission (R. 28), by The Kansas City Southern Railway Company and Texarkana and Ft. Smith Railway Company (R. 33), and by the Receivers of The Chicago and Alton Railroad Company (R. 46), which parties were permitted to intervene (R. 33).

The application for a temporary injunction was heard by Evans, Circuit Judge, and Carpenter and Wilkerson, District Judges, and at the hearing it was agreed that the hearing should be a final one (R. 54).

On May 14, 1928, the court handed down its opinion, finding that the bill filed by appellants should be dismissed for want of equity. The opinion of the court, appearing at pages 56 to 58 of the record, in part follows:

> "Plaintiffs state their attack upon the Commission's ruling thus:
>
> 'Our action is predicated on the rights given us under paragraph 3 and 4 of section 15 of the Interstate Commerce Act.'
>
> 'The effect of the order which is sought to be set aside is to require the plaintiffs to deliver grain to connecting lines at junctions such as Kansas City and Wichita and thus short haul themselves rather than be permitted to carry such grain the entire length of their own line.'
>
> Paragraph 3 of section 15, thus referred to, reads:
>
> 'The Commission may and it shall, whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint, or

upon its own initiative, without a complaint, establish through rates, joint classifications, and joint rates, fares or charges, applicable to the transportation of passengers or property to be charged,' etc., etc.

Paragraph 4 of the same section reads:

'In establishing any such through route the Commission shall not, except as provided in section 3 and except where one of the carriers is a water line, require any carrier by railroad without its consent to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management of control therewith, which lies between the termini of such proposed through route unless such connection of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established.'

In the course of the argument, plaintiff's counsel frankly admitted, upon question from the court, that their attack upon the order of the Commission was based solely and entirely upon a lack of authority upon the part of the Commission to make the order complained of. To support this position counsel for plaintiffs insisted that paragraph 4 of section 15 constitutes a limitation upon the Commission's power to regulate rates.

The fundamental difference between counsel is traceable to their difference of opinion as to the character of the order in question. Plaintiffs view it as an order involving routes. Defendants say it is an order affecting rates. Both have some support for their position. For orders affecting rates may and often do affect routes.

If the subject of the order be rates, there can be no question but that the Commission had jurisdiction over the subject matter. And this is so whether the rates be called local, through or proportional rates.

Plaintiff's attack on the order is on the hypothesis that the rate is only incidental to the routing character of the order.

We are inclined to the opposite view. The order,

it seems to us, was one affecting rates and routing was only incidentally involved, and as an indirect result of the change in rates.

Moreover, we reject the contention that paragraph 4 of section 15 imposes a limitation upon the Commission's authority to deal with rates as such. *Virginian Railroad Company* v. *United States*, 272 U. S. 658, 664-665. So long as the Commission deals with the question of the reasonableness of the carrier's rates, its authority to act is unquestioned—certainly not limited by subsections 3 and 4 of section 15.

That the Commission was dealing with the subject of tariffs is more clearly shown if the facts be stated somewhat differently. We thereby get another approach to the question.

Plaintiffs had on file with the Commission local tariffs governing the transportation of grain from Colorado and other western points to Kansas City. They also had on file local tariffs for transporting the same commodity from Kansas City to gulf points. They likewise had on file through tariffs for transporting these same commodities from the points of origin to Colorado etc. to the Gulf points. This was the situation confronting them when they filed their new schedule of rates from the aforesaid Colorado and other western points to Kansas City. Whether these new schedules are called local, or a part of through rates, or proportional rates, or varying proportionals, they are nevertheless tariffs. And their reasonableness was the legitimate subject of inquiry and determination by the Commission."

On June 4, 1928, the court entered its decree dismissing the bill (R. 58), and thereupon the Missouri Pacific, Rock Island, and Santa Fe appealed to the United States Supreme Court from the final decree dismissing the bill, and an order allowing the appeal was entered on June 22, 1928 (R. 62).

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

The District Court erred:

I.

In failing to set aside and annul the Commission's order of July 6, 1927.

II.

In failing to issue a permanent injunction of the court suspending, restraining and enjoining the Commission's order of July 6, 1927 and enjoining the enforcement, or the attempt to enforce, said order.

III.

In holding that the issuing of said order of July 6, 1927 was within the authority conferred upon the Commission by the Interstate Commerce Act.

IV.

In refusing to hold that the order of the Commission of July 6, 1927, was null and void because in violation of Paragraph (4) of Section 15 of the Interstate Commerce Act.

V.

In refusing to hold that the order of the Commission of July 6, 1927 was null and void because it requires plaintiffs, without their consent, to participate in through routes embracing substantially less than the entire length of their railroads between the termini of said proposed

through routes, notwithstanding the fact that the already existing through routes of each of your plaintiffs were not and are not unreasonably long as compared with the through routes required to be established by the order of the Commission.

VI.

In holding that the order of the Commission of July 6, 1927 was one relating to the reasonableness of rates under Section 1 of the Interstate Commerce Act, and not an order requiring the participation of plaintiffs in routes which short haul them contrary to the provisions of Paragraph (4) of Section 15 of the Interstate Commerce Act.

VII.

In holding that the reasonableness of any rate of plaintiffs was an issue properly before the Commission in its Investigation and Suspension Docket No. 2813.

VIII.

In refusing to hold that Paragraph (4) of Section 15 of the Interstate Commerce Act constitutes a limitation upon the jurisdiction of the Commission under Section 1 of the Interstate Commerce Act as to the volume of a rate via a route which the Commission is prohibited from establishing by reason of the provisions of said Paragraph (4).

IX.

In holding that the order of the Commission of July 6, 1927 is a valid exercise of the power of the Commission to determine the reasonableness of rates rather than a requirement that plaintiffs participate in through routes in violation of the provisions of Paragraph (4) of Section 15 of the Interstate Commerce Act.

X.

In refusing to hold that the order of the Commission was without evidence to support it.

XI.

In dismissing the petition of plaintiffs for alleged want of equity and denying their application for an injunction. (R. 60, 61, 62).

SUMMARY OF ARGUMENT.

I.

The order of Division 4 of the Interstate Commerce Commission of July 26, 1927, was null and void because it requires appellants without their consent to embrace in through routes substantially less than the entire length of their railroads between the termini of such through routes, contrary to the provisions of Paragraph (4) of Section 15 of the Interstate Commerce Act.

II.

Division 4 of the Interstate Commerce Commission erred in finding that if through routes already exist appellants were precluded from withdrawing from participation in such through routes.

III.

Division 4 of the Interstate Commerce Commission and the District Court erred in holding that the reasonableness of any rate of appellants was in issue in I. & S. Docket No. 2813, and that the Commission may pass upon the reasonableness of a rate via a route which the Commission could not lawfully establish under Paragraph (4) of Section 15 of the Interstate Commerce Act.

IV.

The order of Division 4 of the Interstate Commerce Commission was made without competent evidence to support it.

ARGUMENT.

I.

THE ORDER OF DIVISION 4 OF THE INTERSTATE COMMERCE COMMISSION OF JULY 26, 1927, WAS NULL AND VOID BECAUSE IT REQUIRES APPELLANTS WITHOUT THEIR CONSENT TO EMBRACE IN THROUGH ROUTES SUBSTANTIALLY LESS THAN THE ENTIRE LENGTH OF THEIR RAILROADS BETWEEN THE TERMINI OF SUCH THROUGH ROUTES, CONTRARY TO THE PROVISIONS OF PARAGRAPH (4) OF SECTION 15 OF THE INTERSTATE COMMERCE ACT.

In this subdivision of the brief there are discussed the issues set forth in Numbers I to V, inclusive, of the assignments of error, and Numbers I to III, inclusive, of the points relied upon by appellants (R. 489, 490).

At common law and under the provisions of the Interstate Commerce Act, the right of a carrier to hold traffic originating on its line to its own rails as far as it can transport such property is and always has been recognized. Such right is founded on common justice.

The Act to Regulate Commerce of February 4, 1887, 25 Stat. L. 379, did not confer upon the Commission any power to establish through routes, and until 1906 the establishment or concurrence in any such routes was completely within the control of the carrier, and such carrier's right to prevent itself from being short hauled was recognized and upheld under the common law.

Thus in *Little Rock & M. R. Co.* v. *East Tennessee, V. & G. R. Co. et al.* 47 Fed. 771, decided in 1891, the facts were as follows:

> "The Iron Mountain Railroad from St. Louis, Mo., to Texarkana, Ark., and with its connections

reaching into Louisiana and Texas and across the continent, has a branch from its main line at Bald Knob, Ark., to Memphis, Tenn. The Little Rock & Memphis Railroad runs from Little Rock, Ark., where it has a physical connection with the Iron Mountain road, to Memphis, Tenn., on a line 15 miles shorter than the other. At Memphis each road has equal facilities for connections with and transfers to roads running into the states east of the Mississippi river if the Little Rock & Memphis facilities be not superior, as the bill alleges. The East Tennessee, Virginia & Georgia Railroad, with its leased line of the Memphis & Charleston Railroad, runs from Memphis eastwardly into several states and to the seaboard. Formerly, and before the building of the Bald Knob branch of the Iron Mountain road, the Little Rock & Memphis road had traffic arrangements with the Iron Mountain and East Tennessee, Virginia & Georgia roads for the through ticketing of passengers both ways. Since the building of its Bald Knob branch the Iron Mountain road refuses to recognize through tickets over the Little Rock & Memphis road to or from points in the Iron Mountain system beyond Little Rock, and the East Tennessee, Virginia & Georgia road declines to keep such tickets on sale, or to offer its passengers a choice of routes, because the Iron Mountain will not take the tickets; but it does issue on equal terms through tickets over either route to Little Rock itself."

In approving the action of the Iron Mountain, the court said:

"It is a misnomer to call that which the Iron Mountain is doing 'a discrimination' against the plaintiff under the Interstate Commerce Act, or any other careful use of that word. It is not the case of a road preferring unjustly, unduly and unreasonably one of two equally adequate carriers from a given point to a given point, but the case of a competitor or rival so conducting its business and using its powers of ownership as to divert travel from its rival to itself."

Again in 1906, just prior to the insertion of the first through route and through rate clause of the Interstate Commerce Act, the Supreme Court in *Southern Pacific Company, et al.* v. *Interstate Commerce Commission*, 200 U. S. 536, said at page 553:

> "It is conceded that the different railroads forming a continuous line of road are free to adopt or refuse to adopt joint through tariff rates. The Commerce Act recognizes such right and provides for the filing, with the Commission, of the through tariff rates, as agreed upon between the companies. The whole question of joint through tariff rates, under the provisions of the Act, is one of agreement between the companies, and they may, or may not, enter into it, as they may think their interests demand."

The first through route and through rate provision inserted in the Interstate Commerce Act was that contained in the amendment of June 29, 1906, Chapter 3591, Section 4, 34 Stat. 584, at 590, reading as follows:

> "The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line."

Under the provision above quoted it is seen that the jurisdiction of the Commission could be invoked only where no reasonable or satisfactory through route already existed, and, therefore, a carrier having a reasonable and satisfactory route of its own was fully protected against being short hauled.

The limitation upon the power of the Commission was strongly upheld in *Interstate Commerce Commission* v. *Nor. Pac. Ry. Co.* 216 U. S. 538, decided March 7, 1910. There the Supreme Court upheld an order of a lower federal court setting aside an order of the Interstate Commerce Commission establishing through routes and joint passenger fares to points on the Northern Pacific between Portland and Seattle. In that case the Supreme Court even went so far as to go behind the finding of the Interstate Commerce Commission that reasonable or satisfactory through routes did not exist, and found such routes did actually exist via the single line of the Northern Pacific or connections affording it a long haul from the East. Discussing the desire of railroad patrons for an option to go by two or more different routes, the Supreme Court said:

> "It appears to us that these grounds do not justify the order. The most that can be said of them is that they are reasons for desiring a second through route, but they are not reasons warranting the declaration that 'no reasonable or satisfactory through route exists.' Obviously that is not true, except by an artificial use of words. It cannot be said that there is no such route, because the public would prefer two. The condition in the statute is not to be trifled away."

By the amendment of June 18, 1910, Chapter 309, Section 12, 36 Stat. 539, at page 552, the provision was amended to read as follows:

> "The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications; and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to estab-

lish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line. The Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, nor shall the Commission have the right to establish any route, classification, rate, fare or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

And in establishing such through route, the Commission shall not require any company without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established."

By the amendment of 1910, the Commission was given the authority to establish through routes and joint rates wherever the carriers had refused to establish voluntarily such routes and rates, but for the first time there is found the positive requirement of Congress that the Commission, in requiring carriers to establish through routes, shall not require any carrier to deprive itself of a haul over the entire length of its line of railroad between the termini of such through routes, unless to include such lines would make such route unreasonably long as compared with another practicable through route which could otherwise be established. In making this proviso, Congress adopted a well defined policy and took a positive stand to the effect that the Commission was

not to be given arbitrary authority over the carriers in establishing through routes, and that the carriers, having built lines of railroad for the benefit of the public, should be permitted to use those lines of railroad to the fullest extent, and not be required to surrender their originated traffic at some short-haul junction to carriers who had neither the foresight nor the courage to extend their lines of railroad into new territory for the purpose of developing traffic.

The clause was not thereafter amended until the Transportation Act of 1920, 41 Stat. L. 456, by which act there was stricken out the clause in the Act of 1910 by which the Commission's power to establish through routes was dependent upon failure of the carriers to establish them voluntarily. The through routing provisions now appear as paragraphs (3) and (4) of Section 15 of the Interstate Commerce Act, and the parts thereof pertinent to this investigation are as follows:

> "(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property . . .
>
> (4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established . . ."

The addition of the proviso as to Section 3, and the exception where one of the carriers is a water line, contained in paragraph 4, need not be considered, as the order is in nowise predicated upon those exceptions. At common law, therefore, a carrier had an unlimited right to restrict traffic to its own rails as far as possible and even since the right to establish through routes and joint rates has been conferred upon the Interstate Commerce Commission, the exercise of such right by that Commission is limited by the proviso that in such exercise it must preserve the right of a carrier to the long haul upon traffic originated by it, except in instances where the route of such originating carrier would be unreasonably long as compared with another practicable through route which could otherwise be established. The routes of appellants preserving to them the long haul upon this traffic are reasonably direct, but that evidence need not be considered here because there is no finding by Division 4 that the routes of these appellants are unreasonably long as compared with the routes of the lines naming the outbound varying proportional rates.

The most recent case, however, in which this court has unqualifiedly extended the protection of Paragraph (4) of Section 15 to a carrier which would have been short hauled by an order of the Interstate Commerce Commission is *United States* v. *Missouri Pacific Railroad Company*, decided January 2, 1929, reported 73 L. ed. page 136. In that case an order of the Interstate Commerce Commission, on traffic from beyond Memphis, for that part of the transportation from Memphis to Ft. Smith, established a route via the Rock Island Railroad for 222.3 miles, via the Subinco Railroad for a distance of 40.3 miles, and via the Missouri Pacific to destination, Ft. Smith, Ark., of 46.1 miles, where the Missouri Pacific

had its own not unreasonably long route all the way from Memphis to Ft. Smith. In affirming a decree of the lower court which had annulled and set aside the order of the Commission establishing such route, the court, speaking through Mr. Justice Butler, says at page 138:

> "The act does not give the Commission authority to establish all the through routes it may deem necessary or desirable in the public interest. The general language of Paragraph (3) is limited by Paragraph (4). The latter lays down the rule that, subject to specified exceptions, a carrier may not be compelled to participate in a through route which does not include substantially its entire line lying between the termini of the route. The purpose is to protect the long-haul routes of carriers. It is clear that, within the meaning of Paragraph (4), the mileage of the Missouri Pacific between its Mississippi river crossings and Fort Smith lies between the termini of all routes through or from such gateways westbound over the line of the Subiaco. The existing routes include these Missouri Pacific lines and give that company long hauls as compared with the length of the Paris branch. The latter is the only line of the company included in the Subiaco route. The order is plainly repugnant to the rule prescribed by that paragraph. And, as neither Section 3 nor water transportation is involved, and existing routes were not found unreasonably long, the proposed route is not within the exceptions specified in that paragraph."

The action of respondents in publishing the inbound varying proportional rates suspended herein was an exercise of their undoubted right to preserve to themselves the long haul upon traffic originated upon their lines, and their right so to protect themselves should not be abridged. That right may be defeated by the publication of proportional rates by a competing carrier as well as by the establishment of joint through rates. That fact was recognized by the Commission in *Wichita*

Board of Trade v. *A. & S. Ry. Co. et al.* 29 I. C. C. 376, wherein, in denying the request of Wichita for the establishment of open proportional rates from that point applicable via all lines on grain and grain products moving to the South and East, the Commission at page 379 said:

> "The complaint is a request to the Commission to establish all possible through routes by way of Wichita for the transportation of grain from Kansas fields to the south and east. This request disregards the limitation upon the power to establish through routes. The theory of the complaint is that the inbound carrier has no right to be concerned regarding the line of movement of the outbound traffic. This would be so if all the railroads were owned by the government or by a single company, but it is not so under the law as it stands to-day.
>
> Congress has expressly placed upon this Commission the prohibition against forming a through route which gives to the originating carrier less than the full length of its line haul, 'unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.' "

There is thus a recognition by the Commission that the right of a carrier to its long haul can be defeated by the publication of a proportional rate, as the rights of these appellants to the long haul on their traffic is defeated by the varying proportional rates published from Kansas City and Wichita by the lines naming such rates. What does it avail these appellants to continually refuse to participate in joint through rates from stations on their lines of railroad to the Gulf ports if, by the device of the varying proportional rate, exactly the same result is accomplished, and the direct rates applicable over appellants' lines made applicable via Kansas City and Wichita and the varying proportional rate lines without the consent of, and over the objection of, these appellants?

Appellants' action in giving a proportional application to inbound rates higher than the local rates constitutes the only method by which they can cope with this situation, and when those rates are suspended by the Commission, it compels the participation by these appellants in through routes and rates short hauling them, directly contrary to the limitation contained in Paragraph (4) of Section 15 of the Interstate Commerce Act.

By the order of Division 4, the limitation contained in Paragraph (4) of Section 15 is *trifled away*, as stated by the court in *Interstate Commerce Commission* v. *Northern Pacific Ry. Co. supra*.

II.

DIVISION 4 OF THE INTERSTATE COMMERCE COMMISSION ERRED IN FINDING THAT IF THROUGH ROUTES ALREADY EXIST APPELLANTS WERE PRECLUDED FROM WITHDRAWING FROM PARTICIPATION IN SUCH THROUGH ROUTES.

In this subdivision of the brief there are also discussed the issues set forth in Numbers I to V, inclusive, of the assignments of error, and Numbers I to III, inclusive, of the points relied upon by appellants (R. 489, 490).

In its opinion Division 4 of the Interstate Commerce Commission stated (R. 23):

> "A through route is an arrangement, express or implied, between connecting railroads for continuous carriage from a point on the line of one to a destination on the line of another. A joint rate is not essential. The through rate may as well be a combination of locals or proportionals. *St. Louis S. W. Ry. Co.* v. *United States*, 245 U. S. 136, 139, note 2, and *Virginian Ry.* v. *United States*, 272 U. S. 658, 666. There is no question in our minds but what there have been and are at least implied arrangements for the through carriage of this traffic

> sufficient to constitute all of these routes through routes within the meaning of the act, and their status would not be affected by the suspended inbound proportionals here considered."

Even though the former existence of appellants' local rates to Kansas City plus the open proportional rates beyond to Gulf ports for export of 30.5 cents, or the existence of appellants' local rates to Kansas City plus the varying proportional rates of the outbound lines, together with the fact that in the past traffic actually moved via such routes, constituted such routes through routes, nevertheless Division 4 of the Interstate Commerce Commission entirely ignored the right of appellants to withdraw from participation in such routes and ignored the many findings of the Commission to the effect that its right to require the continuance of existing rates and routes does not exist in cases where it could not have initiated such routes originally.

It has been well established that paragraph (4) of Section 15 of the Interstate Commerce Act constitutes a limitation upon the power of the Commission to require a carrier to continue in operation such a route and rate thereover as would have been beyond the power of the Commission to establish in the first instance.

The situation is analogous to the voluntary maintenance by the carrier of a lower than reasonable rate. Such a lower than reasonable rate might be maintained voluntarily by a carrier if thereby it secured added business which otherwise it could not handle and was not so low as to jeopardize the maintenance of adequate transportation by such carrier or the level of rates generally, but it is equally well established that the Commission could neither require a carrier to publish such a rate in the first instance nor require the continuance of that rate by the carrier if it desired to withdraw from such business.

The opinion of Division 4 merely finds the existence of through routes prior to the publication by appellants of their inbound varying proportional rates. It entirely ignores the fact that even though such routes existed those appellants might withdraw from them. That principle has been recognized by the Interstate Commerce Commission itself in many cases. The principal case of that nature is the *Ogden Gateway case*, 35 I. C. C. 131. In that case the Union Pacific System proposed to extend the joint through passenger fares then in effect in connection with the Denver & Rio Grande between points in the territory of the Oregon Short Line and points east of and including Colorado common point territory. The purpose of that course was to give the Union Pacific Railroad and the Oregon Short Line Railroad, two of the lines forming a part of the Union Pacific System, a longer haul than they then enjoyed on passenger traffic to and from the local territory served by the Oregon Short Line. The issue was clearly defined by the Commission's opinion, wherein at page 134 it was said:

> "If the tariffs become effective, the main line of the Rio Grande will be eliminated as an optional route, except at a higher charge, to or from the territory affected, although its rails extend from Denver to Ogden through probably the best known and most widely advertised section of the Rocky Mountains. This course has been proposed in order that the Union Pacific, as before stated, may obtain a longer haul of passengers traveling to and from the territory of the Oregon Short Line. The Denver & Rio Grande contends that this is a discrimination against it and is not the exercise of a legal right of the Union Pacific.
>
> Through fares between the territories in question have been in effect over the rails of the respondent in connection with the Denver & Rio Grande since 1901, and there was agreed of record a full history of the facts and conditions under which that route was put on a rate parity with the

more direct route of the respondent. It is not necessary, however, to discuss the history of the adjustment here; it will suffice to say that the tariffs under suspension propose to alter a rate adjustment that has been in effect continuously for a period of nearly 18 years."

Thus, there was in evidence and before the Commission an existing through route and an existing through rate thereover, which the respondents proposed to cancel. However, on page 140 the Commission says:

"There is no occasion here for a review of the cases cited or for any further discussion of the scope and application of that part of Section 15 of the act under which we may require interstate carriers to establish through routes and joint rates. The provision has been already sufficiently construed. Every such controversy, however, must be considered in the light of all the facts and conditions surrounding it. But this much may be said in addition to what has already been said by the Commission in its published reports, namely, that we do not perceive from the language of the act that we have any larger or different powers when dealing with tariffs by which it is proposed to cancel an existing through route and existing joint fares applicable thereto than we have in connection with a complaint praying for an order establishing a through route and reasonable and just rates applicable thereto where no such route has already been established."

Further on the same page, the Commission says:

"Our authority in such matters is statutory and cannot be enlarged by the previous course of the carriers. We think it clear that we have no power under Section 15 nor should we assume the power, to prevent the cancellation of through routes and joint rates voluntarily established by the carriers when, as in this case, the circumstances and conditions are such as would not warrant an order to compel such arrangements if not already in effect."

Similarly, in *Restriction in Routing of Traffic from*

Pacific Northwest Points, 73 I. C. C. 305, the Commission found justified the proposal of the Fort Worth & Denver City and Wichita Valley Railways to restrict the application of joint rates from the Pacific Northwest to points on or via the Fort Worth & Denver City and Wichita Valley lines to their direct route via Texline, Texas, and it thereby canceled a number of existing routes under which those lines would have received the traffic at Fort Worth, Wichita Falls or Chillicothe, Texas. The use of the routes there canceled accorded the Fort Worth and Denver City a considerably shorter haul than if traffic from the Pacific Northwest were delivered to it at Texline, Texas. This cancellation of routes which was approved by the Commission necessarily resulted in leaving in effect higher combinations of rates over a number of existing routes than would apply via the route through Texline, Texas.

A number of other cases in which the Commission permitted the cancellation of through rates over existing through routes are referred to in *Routing on Coal from Western Maryland Mines to Eastern Destinations*, 66 I. C. C. 103, where at page 107 of the report the Commission says:

> "Respondent directs attention to the fact that no shipper appeared in opposition to the cancellation of the route via Cherry Run, and that even if the proposed schedules became effective the joint rates established by the Director General would continue to apply via Cumberland, and contends that the latter route is therefore not shown to be necessary or desirable in the public interest within the meaning of section 15 of the Act, citing *Marble Rates from Vermont Points*, 29 I. C. C. 697, *The Ogden Gateway Case*, 35 I. C. C. 131, *Ocean and Rail Rates to Charlotte, N. C.* 38 I. C. C. 405, and *West Coast Lumber Mfrs. Assn. v. S. P. & S. Ry. Co.* 45 I. C. C. 230, to show that under such circumstances we have no authority to require the continuance of the route

via Cherry Run. In the first case cited the route was canceled in order that the originating carrier might conserve the long haul, and we found that the cancellation was justified, as it did not appear that the public interest was in anywise jeopardized thereby. In *The Ogden Gateway Case* we permitted the Union Pacific to cancel its joint fares in connection with the Denver & Rio Grande, as it appeared that the former had a very much shorter route over its own rails between the points of origin and destination. In that case we laid down the principle that we have no power to prevent the cancellation of a through route if we could not have required the establishment of the route as an original proposition. In *Ocean-and-Rail Rates to Charlotte, N. C.*, all of the participating carriers desired the discontinuance of the route proposed to be canceled, and as no shipper or community directly interested requested its maintenance we held, under the principle announced in *The Ogden Gateway Case*, that the cancellation should be allowed to stand. In *West Coast Lumber Mfrs. Assn.* v. *S. P. & S. Ry. Co.*, defendant, the originating carrier, canceled its joint rates in connection with the Union Pacific. It appeared that there were available practicable through routes which embraced the entire length of defendant's line. There was no showing that the public interest would suffer from the cancellation of the Union Pacific route, and, again applying the principle announced in *The Ogden Gateway Case*, we held that such cancellation was justified. In the instant proceeding the proposed restriction in routing would operate to deprive the originating carrier of its long haul, and the schedules were filed against its express wishes. It is well settled that if a carrier has traffic in its possession it should be allowed to handle it by its own line as far as it can unless the public interest would suffer thereby."

A later case in which the Commission allowed carriers to withdraw from existing through rates and routes in order to avoid being short hauled upon their traffic is *Restrictions in Routings over S. L. & U. R. R.*, decided by Division 3 of the Interstate Commerce Commission

August 20, 1926, and reported in 115 Interstate Commerce Commission Reports at page 357. In that case the respondents were permitted to eliminate the Salt Lake & Utah Railroad from participation as an intermediate carrier on domestic and export traffic from eastern transcontinental group to points in the far western states. The Division also refused to establish joint rates and routes including the Salt Lake & Utah on eastbound traffic. The opinion of Division 3 was affirmed by the entire Commission on January 10, 1927, 122 Interstate Commerce Commission Reports 209. It is thus seen that upon a correct principle of the law the Commission has consistently permitted carriers to withdraw from rates and routes which it could not establish in the first instance. Even though through routes exist as found by Division 4, such fact would not warrant an order denying appellants the right to withdraw from participation in such routes.

In the opinion of Division 4, and in the opinion of the District Court, reference is made to and reliance is had upon the decision of this court in *Virginian Railway* v. *United States*, 272 U. S. 658. The pertinency of that decision, however, is not apparent. In that case there was not involved the question of the short hauling of a carrier contrary to the provisions of paragraph (4) of Section 15 of the Interstate Commerce Act. The Virginian Railway had no routes from stations on its lines to the destinations in western territory involved. In that case, this court merely approved the establishment of reasonable rates via routes which did not short haul the Virginian Railway.

III.

DIVISION 4 OF THE INTERSTATE COMMERCE COMMISSION AND THE DISTRICT COURT ERRED IN HOLDING THE REASONABLENESS OF ANY RATE OF APPELLANTS WAS IN ISSUE IN I. & S. DOCKET NO. 2813, AND THAT THE COMMISSION MIGHT PASS UPON THE REASONABLENESS OF A RATE VIA A ROUTE WHICH THE COMMISSION COULD NOT LAWFULLY INSTITUTE UNDER PARAGRAPH (4) OF SECTION 15 OF THE INTERSTATE COMMERCE ACT.

In this subdivision of the brief there are discussed the issues set forth in Numbers VI to IX, inclusive, of the assignments of error, and Numbers IV to VII, inclusive, of the points relied upon by appellants (R. 489, 490).

The fundamental error of the opinions both of Division 4 of the Interstate Commerce Commission and of the District Court lies in the fact that both those bodies considered that in some way the reasonableness of a rate charged a shipper was in issue in I. & S. Docket 2813, and that the action of Division 4 in that proceeding constituted a lawful exercise of the power of the Commission to determine and fix reasonable rates. The question of the reasonableness of any rate was not involved in I. & S. Docket 2813.

In the opinion of Division 4 it is stated (R. 23):

> "There remains to determine only the question of whether respondents have sustained the burden of justifying the proposed inbound proportional rates which, as heretofore stated, are higher than the corresponding local rates by amounts ranging from 0.5 to 7.5 cents and would increase the through rates over certain of the existing through routes by similar amounts. Respondents have made no attempt to justify the proposed inbound proportional rates in and of themselves. The routes via Kansas City over which the proposed inbound proportional rates

would increase the through charges are in many instances shorter than the routes via that point over which the rates would not be increased. The only justification offered by respondents for an increase in the rates over such routes is their desire to retain the long haul, which, under the circumstances shown, is not sufficient. They have not sustained the burden upon them of showing that the increased through rates over the routes referred to would be reasonable and otherwise lawful."

The same error is apparent in the opinion of the District Court. In the course of that opinion it is stated (R. 57):

"In the course of the argument, plaintiff's counsel frankly admitted, upon question from the court, that their attack upon the order of the Commission was based solely and entirely upon a lack of authority upon the part of the Commission to make the order complained of. To support this position counsel for plaintiffs insisted that paragraph 4 of section 15 constitutes a limitation upon the Commission's power to regulate rates.

"The fundamental difference between counsel is traceable to their difference of opinion as to the character of the order in question. Plaintiffs view it as an order involving routes. Defendants say it is an order affecting rates. Both have some support for their position. For orders affecting rates may and often do affect routes.

"If the subject of the order be rates, there can be no question but that the Commission had jurisdiction over the subject matter. And this is so whether the rates be called local, through or proportional rates.

"Plaintiff's attack on the order is on the hypothesis that the rate is only incidental to the routing character of the order.

"We are inclined to the opposite view. The order, it seems to us, was one affecting rates and routing was only incidentally involved, and as an indirect result of the change in rates.

"Moreover, we reject the contention that paragraph 4 of section 15 imposes a limitation upon the

Commission's authority to deal with rates as such. *Virginia Railroad Company* v. *United States*, 272 U. S. 658, 664-665. So long as the Commission deals with the question of the reasonableness of the carrier's rates, its authority to act is unquestioned—certainly not limited by subsections 3 and 4 of section 15. * * *

"Whether these new schedules are called local, or a part of through rates, or proportional rates, or varying proportionals, they are nevertheless tariffs. And their reasonableness was the legitimate subject of inquiry and determination by the Commission."

The effect of the rule laid down by Division 4 and the District Court is that although the Commission is prohibited from establishing certain through routes and through rates thereover, which would in effect short-haul an originating carrier, exactly the same prohibited purpose can be lawfully accomplished by the action of the Commission in passing upon the reasonableness of the rate applicable over such prohibited route. Such theory is fundamentally unsound and contrary to the most elementary rule of statutory construction.

Under such construction, Paragraph (4) of Section 15 would be rendered meaningless and of no effect whatsoever. The proper construction is, of course, one which would give full effect both to the power of the Commission under Section 1 of the Interstate Commerce Act, to find a rate unreasonable and to establish a reasonable rate in lieu thereof, and the limitation upon the Commission's power to establish through rates and routes contained in Paragraph (4) of Section 15.

In so far as giving effect to both provisions of the act, what would it matter to appellant Santa Fe Company that the Commission is prohibited from establishing a through route from Dodge City, Kansas, to Galveston, Texas, via the route of the Santa Fe to Wichita

and the Midland Valley Railroad and its connections beyond, and requiring it to apply the present rate of 47 cents upon wheat and flour thereover, if exactly the same result can be accomplished under Section 1 of the Interstate Commerce Act by a finding of the Commission that the rate on wheat and flour from Dodge City to Galveston, via the route of the Santa Fe and the Midland Valley, which rate consisted of a combination of local rates to and from Wichita, Kansas, was unreasonable to the extent that it exceeded the single-line rate of the Santa Fe of 47 cents?

The rule that a statute should be construed so as to give full effect to all its provisions is one of the most elementary rules of statutory construction.

In *Peck et al.* v. *Jenness et al.*, 7 Howard 611, this court, at page 622, said:

> "But it is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every clause and provision shall avail, and have the effect contemplated by the legislature. One portion of a statute should not be construed to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together."

In *Market Co.* v. *Hoffman*, 101 U. S. 112, at page 115, it was stated:

> "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated

> innumerable times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each."

Again, in *United States* v. *Lexington Mill Co.*, 232 U. S. 399, the language above set forth in *Market Co.* v. *Hoffman, supra*, is quoted with approval by the court.

Further citation in support of this elemental rule is deemed unnecessary. The Interstate Commerce Commission itself has consistently applied the construction contended for by appellants, and in a large number of cases has recognized that its power to declare a rate unreasonable does not apply to a rate via a route which it is prohibited from establishing or maintaining.

Thus, in the *Ogden Gateway case, supra*, the following language appears at page 134 of the Commission's opinion:

> "If the tariffs become effective, the main line of the Rio Grande will be eliminated as an optional route, *except at a higher charge*, to or from the territory affected, although its rails extend from Denver to Ogden through probably the best known and most widely advertised section of the Rocky Mountains."

Therefore, in that case, which was the first important case in which the Commission recognized that it had no power to require the continuance of a rate and route it could not establish in the first instance, the effect of the elimination of the Denver & Rio Grande Railroad from the through routes between Colorado common point territory and the territory farther west was to leave in effect higher rates via the route which partly embraced the Denver & Rio Grande Railroad.

In *Routing on Sheep from K. C. M. & O. Points*, 69 I. C. C. 4, the cancellation of the routes there permitted

necessarily left actually in effect via such cancelled routes higher combinations of rates.

In *Restrictions in Routing of Traffic*, 73 I. C. C. 305, the Fort Worth & Denver City Railway was permitted to restrict the application of joint rates from the Pacific Northwest to points on or via that railroad to the route through Texline, Texas. Various interests protested against such cancellation and pointed out that via Fort Worth combination rates would apply to points on respondent lines while lower joint rates would apply over those lines to farther distant points. Nevertheless, respondents were permitted to cancel the routes via Fort Worth and leave in effect higher combination rates.

In fact, in every case where the cancellation of joint rates via certain routes has been permitted by the Commission, of necessity there remains in effect a higher combination of rates, which combination, if reduced to the level of the lower joint rate applying via some other route, would render meaningless the permitted cancellation of the route involved.

In *Lamon-Cove-Woodlake Ass'n* v. *A. T. & S. F. Ry. Co.*, 139 I. C. C. 239, the Commission specifically stated that the general provisions of Section 1 (4), that carriers shall establish through routes and reasonable rates applicable thereto, are subordinate to the specific provisions of Section 15 (4), which provides, in substance, that the Commission may not order the establishment of through routes which will short haul an originating rail carrier, except in two instances not involved in these proceedings.

The latest and most important case in which the Commission has clearly and unqualifiedly recognized the construction contended for by appellants is *Port of New York Authority* v. *A. T. & S. F. Ry. Co.*, decided by the

entire Commission June 11, 1928, reported in 144 Interstate Commerce Commission Reports at page 514.

In that case, certain shipping and municipal interests on Long Island sought the establishment by the Commission of joint through rates between points on Long Island and points west of the New York-Pennsylvania state line, via the route of the Long Island Railroad, the New York Connecting Railroad over Hell Gate bridge, the New Haven Railroad, and the New York Central Railroad. In discussing the facts the Commission says (page 515):

> "Excepting tunnels, used for passenger traffic and milk trains, the territory served by the Long Island has no other all-rail physical connection with the mainland than the line of the Connecting over Hell Gate bridge, just referred to. While, as stated, traffic moves over this line in interchange with the New Haven to and from points in New England, carload freight traffic between points on the Long Island and the West does not move all rail over the Connecting-New Haven-New York Central by way of Port Morris, which complainant refers to as, and which will herein be called, the Hell Gate route, *because the existing combinations of rates thereover are prohibitive.* Such traffic is handled by car floats between the terminals of the trunk lines on the New Jersey shores or on Manhattan Island, on the one hand, and Bay Ridge and Long Island City, Long Island, where the float bridges of the Long Island Railroad are located, on the other."

In referring to the allegation of the complainants, that the existing rates via the Hell Gate bridge route were unreasonable, the Commission said (page 517):

> "The second of the foregoing allegations seems to presuppose the existence of through routes. Whether such through routes are now in existence we do not deem necessary to determine. *The fact is that as a practical matter the combination rates effectively bar movement, so long as the float rates and routes are open as at present.* As stated by the Port Au-

thority in its report, 'In the last analysis the route is closed because of a rate or traffic situation.' "

Continuing, on page 517, the Commission said:

"While we have the power under section 1 to find combination rates unreasonable upon a proper showing, we must in such cases safeguard the carriers' rights under the short-haul provision of section 15. In *Hughes Creek Coal Co.* v. *K. & M. Ry. Co.*, 29 I. C. C. 671, 674, complainant sought to have the combination rate of $1.35 to Cincinnati in connection with the Chesapeake & Ohio reduced to $1, which was the measure of the joint rate over the Kanawha & Michigan and the Baltimore & Ohio Southwestern. The route in connection with the Chesapeake & Ohio would have given the Kanawha & Michigan a haul of only 35 miles as contrasted with the entire length of its road under the $1 rate. We refused to disturb this situation and upheld the carrier in its contention that it would be short hauled. In numerous cases we have permitted carriers to cancel joint rates or restrict routing, which had the effect of leaving higher combination rates to apply over certain routes, when it appeared that they did so in order to safeguard their long haul. We have done this on the principle that we have no power to prevent the cancellation of a through route if we could not have established the route as an original proposition. See *The Ogden Gateway Case*, 35 I. C. C. 131, 140; *Routing of Coal from Western Maryland Mines*, 66 I. C. C. 303, 307; *Routing of Sheep*, 69 I. C. C. 4, 6. Assuming that the record would support a finding under section 1 that the rates over the Hell Gate route are unreasonable to the extent that they exceed the contemporaneous rates over the float routes, the ultimate effect of any order that we might enter would be to open routes that as a practical matter are not now available and render nugatory and meaningless the provisions of section 15 (4), if defendants are correct in their contention that certain of them will be short hauled if the Hell Gate route is opened."

The Commission then proceeded to discuss the issues referred to, and finding that the Long Island and Penn-

sylvania Railroads were operated under a common management and control, and that they would actually be short hauled by the new route, it refused to establish the through routes and rates requested, although it required the carriers to provide in their tariffs that the Hell Gate bridge might be used in cases of emergency or serious congestion.

In the *Port of New York Authority* case there were then existing physical track connections via the routes sought to be established, and there were in effect higher combination rates than applied via the *car float* routes, which did not short haul the Pennsylvania Railroad. The shipping interests already had reasonable rates via the car float routes, and the Commission recognized that any order which it made requiring the application of such reasonable rates via the all-rail route and the Hell Gate bridge would as a practical matter render *nugatory and meaningless the provisions of Section 15 (4) of the Interstate Commerce Act.*

The same is true in the case before the court now, and is true in every case involving the short hauling of an originating or delivering carrier. In upholding the order of Division 4 as an exercise of the power of the Commission to establish reasonable rates, the District court was apparently under the impression that the reasonableness of some rate was involved. Such was not the case. In I. & S. Docket No. 2923 the reasonableness of no rate was involved. The reasonableness of no rate charged any shipper or user of the railroad was involved. Upon this record there is no complaint as to the volume of the rate from any origin in Kansas, Nebraska or Colorado to any Gulf port. The only question involved is whether such rate, which, for the purposes of this proceeding, must be presumed reasonable, shall be applied via the lines making the outbound proportional rates from Kansas City

as Wichita, or whether the application of such reasonable rate shall be restricted to routes converging to applicants the long haul upon their traffic, which routes have not been found to be unduly or unreasonably long. As in the *Port of New York Authority* case, *supra*, the requirement that the rates of appellants from country origins to Gulf ports be applied in connection with the routes of the outbound carrying proportional rate lines, under any theory of an exercise by the Commission of its jurisdiction to fix a reasonable rate, would render meaningless paragraph (4) of Section 15 of the Interstate Commerce Act, and contrary to law and good conscience deny appellants the protection of that statute.

It might be contended that the act of appellants in giving a proportional application to their inbound rates to the transit points, when the outbound movement was via certain designated lines, constituted an establishment by themselves of a through route and rate and that they can not be heard to complain if the volume of such rate via such route is adjusted by the Commission. Such an argument is wholly specious and falls upon close analysis. In such connection there are two obvious answers. First, appellants, in establishing such inbound proportional rates, did so not for the purpose of creating a channel for traffic, but admittedly in order to effectively close the routes involved. Such method was the only one they could exercise to accomplish this lawful purpose. As in the *Port of New York Authority* case, *supra*, here also as a practical matter the rates sought to be established by appellants would effectively bar movement via the routes of the outbound carrying proportional rate lines, so long as lower rates were maintained via their own routes. And remember that appellants entered into no joint arrangements with the carrying outbound proportional rate lines. Their own through rates were not

by the outbound lines without their consent and over their protest and they were without power to circumvent the outbound varying proportional rate lines in publishing the proportional rates, which had the effect of meeting their own direct rates. Faced with that situation, the only method by which they could protect their lawful rights was the one they pursued, that is, to give a proportional application to their inbound rates when the outbound movement was via the outbound lines naming the varying proportional rates.

Second, as the routes and rates established partly by the action of appellants in publishing varying inbound proportional rates are routes and rates which could not be established by the Commission in the first instance, under the proper construction of the Interstate Commerce Act and as specifically and clearly recognized in the *Port of New York Authority* case, the Commission is without jurisdiction over the volume of rates via such routes. It was, therefore, without authority to adjust the level of the rates applying in connection with the routes of the outbound varying proportional rate lines to the level of the rates maintained by appellants and their connections over routes which accrued to them the long haul upon their originated traffic.

The order of Division 4 was therefore null and void in that it found appellants had not justified the level of the rates proposed to be applied in connection with the routes of the outbound varying proportional rate lines. No such duty rested upon appellants. Their action represented the sole method by which they could lawfully protect their rights.

IV.

THE FINDING OF DIVISION 4 OF THE INTERSTATE COMMERCE COMMISSION WAS MADE WITHOUT COMPETENT EVIDENCE TO SUPPORT IT.

The issue discussed in this subdivision of the brief is set forth in assignment of error Number X, and point relied upon Number VIII (R. 490).

Division 4 found not justified and unreasonable rates on grain and grain products from country origins in Kansas, Nebraska, and Colorado to Texas and Louisiana Gulf ports for export, which rates would have consisted of the varying inbound proportional rates of appellants to Kansas City, plus the outbound varying proportional rates published by the Chicago and Alton, Kansas City Southern, and other railroads hereinbefore referred to. Such basis would exactly equal rates composed of the local rates of appellants to Kansas City, plus an outbound upon proportional rate of 20.5 cents applicable via all lines. Rates constructed upon such basis were found reasonable in *Grain and Grain Products from Kansas and Missouri to Gulf Ports*, decided July 20, 1926, reported 113 I. C. C. 156, wherein the Kansas City Southern ought to reduce the standard proportional rate from Kansas City to the Gulf for export from 20.5 cents to 17.5 cents. No contention is made that the Interstate Commerce Commission in the performance of its administrative duties cannot reach a different conclusion, but it is stressed that an examination of the entire record before the Commission indicates that the sole basis upon which respondents' rates were found not justified was a comparison with the lower direct through rates of appellants, which direct rates were in all cases a few cents lower than the combinations of local rates into Kansas City, plus the proportional rate of 20.5 cents beyond. In other words, the Commission found not justified a basis

of rates approved by it in Grain and Grain Products from Kansas and Missouri to Gulf Ports, supra, solely because appellants had placed Kansas City, Mo., in direct line of transit to the Gulf and thus operated these rates via *east-line* routes through Kansas City, Mo.

Conclusion.

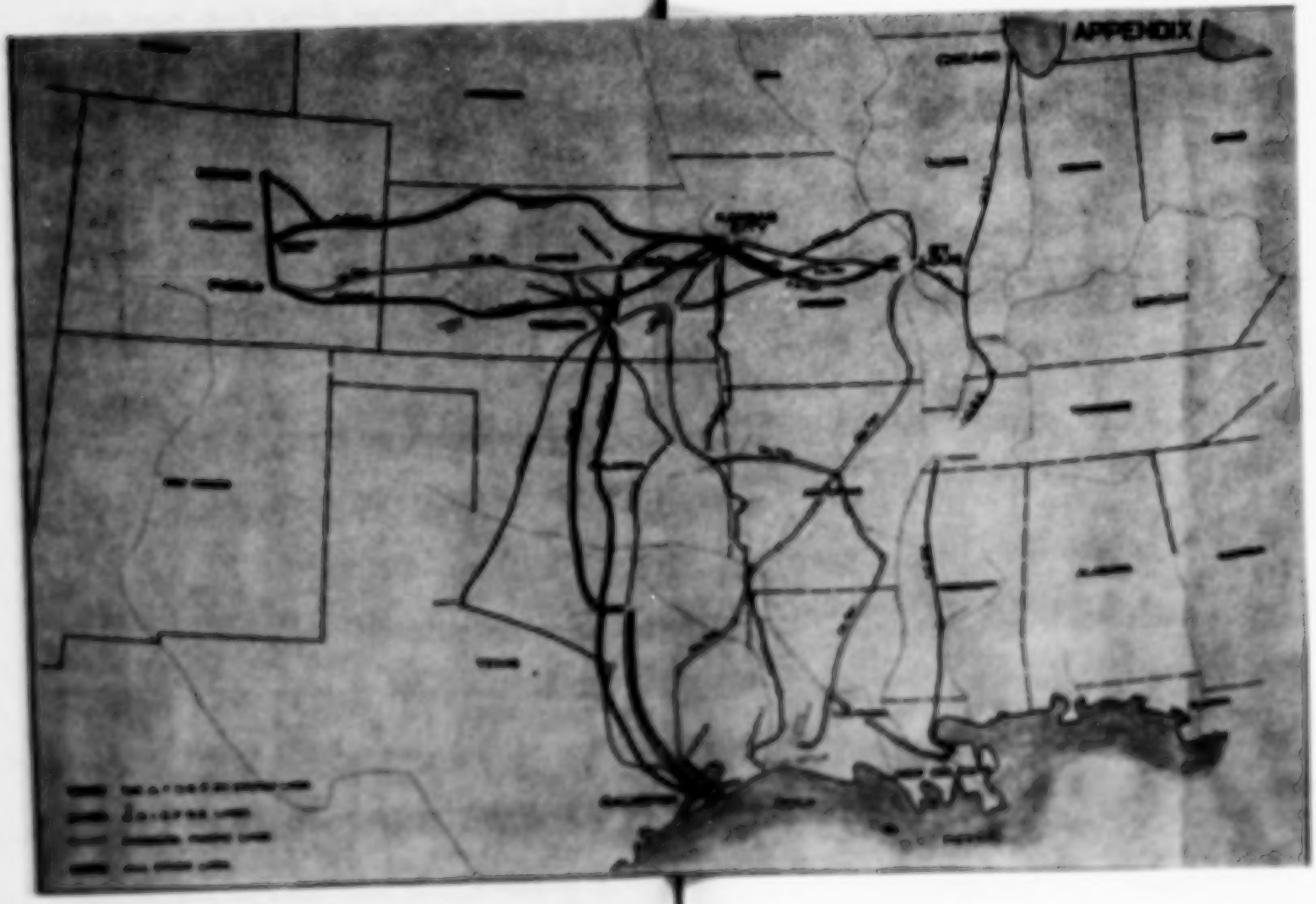
A substantial right granted appellants by the Interstate Commerce Act has been denied them by the order of Division and the decree of the District Court. By such order ad decree they are required to participate in through rates and rates which could not lawfully be established by a Commission, and appellants' undoubted right to withdraw from participation in such routes and rates has been denied them. Nor is the reasonableness of any rate whatsoever involved. There is only involved the question whether or not appellants can be required to participate through routes and through rates which deny them a leg head upon traffic which they originate. The protection granted them by paragraph (4) of Section 15 of the Interstate Commerce Act has been trifled away.

The judgment of the lower court should be reversed and the order of Division 4 of the Interstate Commerce Commission annulled.

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Dated February 27, 1920.
1211 Railway Exchange,
Chicago, Illinois.


APPENDIX

FILED
APR 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 466

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

REPLY BRIEF OF APPELLANTS.

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INDEX.

	Page
I. The proceedings before the Commission did not properly raise the issue of the reasonableness of any rate	2
II. The proceedings before the Commission properly could involve only the participation by appellants in through routes that short hauled them	10
Conclusion	16

Table of Cases.

Port of New York Authority case, 144 I. C. C. 517	3
United States v. Missouri Pacific Railroad, 73 L. ed. 136	5
Virginian Railway Company v. United States, 272 U. S. 659	10
Wichita Board of Trade v. A. & S. 29 I. C. C. 376	12
Grain and Grain Products, 115 I. C. C. 153	16

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Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

REPLY BRIEF OF APPELLANTS.

The briefs filed herein by appellees follow closely the errors evident in the opinions of the Commission and the District Court. These errors have been met and their fallacy explained in the original brief of appellants. Appellees, however, have dressed their argument in such form that, if not clearly analyzed, there might be some plausibility in their contention that this proceeding involved the reasonableness of some freight rates rather than an order of the Interstate Commerce Commission requiring appellants to participate in through routes shorthauling themselves.

The briefs of the United States, the Interstate Com-

metro Commission, and the intervening railroads seek to make the following points:

That the issue before the Commission was one involving the reasonableness and justness of proposed increased rates, and that the case before the Commission did not involve any question of through routes or joint rates and consequently the order of the Commission did not deprive the appellants of any rights reserved to them by paragraphs (3) and (4) of Section 15 of the Interstate Commerce Act. They also contend that the power of the Commission to deal with proposed increased rates under Section 1 of the Interstate Commerce Act is not limited or destroyed by the provisions of paragraphs (3) and (4) of Section 15, and that in any event appellants have received their long haul upon the traffic involved when it reaches Kansas City.

The contention is also made that the order of the Commission is not arbitrary and does not exceed its jurisdiction.

I.

THE PROVISIONS HERETO FOR CONTAINED DO NOT PROHIBIT RATES FOR LONG OR SHORT HAULS OVER ANY ROUTE.

In every case involving the refusal of the Commission to establish a through route short hauling a carrier it has recognized the limitations of its authority to adjust the rate via such route under Section 1, because the exercise of jurisdiction under Section 1 to declare unreasonable the rate via the restricted route would in fact have established the prohibited through route.

Where the Commission lacks power to establish a through route, necessarily it lacks power to adjust the reasonableness of the charge via such prohibited through

cents. This is fully recognized by the Commission in the *Port of New York Authority* case, 256 I. C. C., where at page 147, it said:

> "While we have the power under section 3 to find combination rates unreasonable upon a proper showing, we must in such cases safeguard the carriers' rights under the short-haul provision of section 15."

Again upon the same page:

> "Assuming that the record would support a finding under section 3 that the rates over the Hell Gate route are unreasonable to the extent that they exceed the contemporaneous rates over the Boat route, the ultimate effect of any order that we might enter would be to open routes that as a practical matter are not now available and render inoperative and meaningless the provisions of section 15 (4), if defendants are correct in their contention that certain of these will be short hauled if the Hell Gate route is opened."

To the above declaration of the law there is not one word of answer in the briefs of any of the appellees.

Instead, they choose to ignore the correct and logical reasoning above quoted, and merely request over and over that the reasonableness of rates may at issue.

At page 11 of the railroads' brief it is stated:

> "Increases were proposed in the rates from the country origins to Kansas City and the rates to Kansas were proposed in existing through rates, made by combination via Kansas City. Various railroads and shippers objected to these proposed increases, resulting in the suspension of the tariffs. The burden of justifying the increases was cast upon appellants by the terms of the statute, and they do not claim that they made the required proof. The necessary conclusion is that the Commission's decision was right and should be sustained."

The above language would create an unfair inference. While it is true appellees mention the fact at other

points in the brief, they do not state how that revenue was proposed to apportion local rates to Kansas City only in the event that movement beyond Kansas City was via the Kansas City Southern, Chicago and Alton, or other carrier proportional rate lines. They do not state that in the first instance the local rate would be collected and that higher charges would be assessed only in the event of the above described collateral movement. In fact, that movement would never occur. The shipper had already available a reasonable local rate to Kansas City and a reasonable local rate collected via the lines of appellants.

In support of their theory that the reasonableness of rates was involved before the Commission, the railroad appellees say, at page 27 of their brief, that the legal theory of appellants would practically destroy the jurisdiction of the Commission to determine the reasonableness and justness of railroad rates. Again at page 29 they say:

> "To maintain their (appellants') position, they are driven to rely upon a construction of paragraphs (3) and (4) of Section 15 which completely emasculates Sections 1 and 15 (1)."

The above reasoning is not the test, is unfounded in what manner is the Commission deprived of its jurisdiction over railroad rates? If any shipper desires to challenge the reasonableness of existing rates as to any point from Wichita, Hutchinson, or any other Kansas points to Gulf ports, either via the short direct routes or via the circuitous routes through Kansas City, he is at liberty to file a complaint challenging such rates, and the Commission, should it find them too high, can declare them unreasonable and establish just and reasonable rates. But to the establishment of such just and reasonable rates the law requires that the Commission

protect the long haul of the originating services, but the requirement by its terms encompasses Sections 2 and 13 (1) of the Act.

Also at page 29 of the railroads' brief, it is said:

> "By protecting the long haul of a service under certain conditions, Congress certainly did not mean to create an instrument by which that service would be free to impose unjust and unreasonable rates upon such shippers as chose to ship their freight over other railroads."

In protecting the long haul of a service under certain conditions, Congress did remove the jurisdiction of the Commission as to the reasonableness of rates via such authorized routes if it intended, as we most assuredly did, to give effect to the protection of the service's long haul. Otherwise Congress did nothing at all. The failure of appellees' argument is indicated by an examination of the opinion of this court in *United States v. Missouri Pacific Railroad*, 278 U. S. 269. There, this court sustained the action of the court below enjoining an order of the Interstate Commerce Commission which, on traffic from beyond Memphis, established through rates between Memphis and Fort Smith via a route consisting of the Missouri Pacific, the Iron Mountain, and the Kansas Southern, because the Missouri Pacific had to use rails of the way from Memphis to Fort Smith. In the face of the express declaration of this court that the Missouri Pacific was entitled to its long haul, could it be asserted for one moment that the Commission could make (or sought the opinion of this court and figure the Missouri Pacific of its rights as adjudged, by finding that the through rates from points beyond, consisting of combinations of local rates to and from Memphis, and to and from each of its junctions with the Missouri Pacific, the Iron Mountain and the Kansas, constitute an

aggregate unreasonable charge and by thus seeming to exercise a jurisdiction under Section 1, find such aggregate rate unreasonable to the extent that it exceeds the rate applied by the Missouri Pacific via its own route all the way between Memphis and Fort Smith? To so hold would absolutely destroy the right preserved to the Missouri Pacific by the injunction issued by the lower court and affirmed by this court. The fallacy of such reasoning is apparent on its face.

So the language used by the Commission itself in the *Port of New York Authority* case, supra, the provision of paragraph (6) of Section 15 would become meaningless and nugatory. The Commission itself has recognized this in the *Port of New York Authority* case, holding that the establishment of through routes and through rates would short haul the Pennsylvania Railroad. But it give lip service to paragraph (6) of Section 15 and say that it would not establish through routes which would short haul that railroad but would, by an exercise of its jurisdiction under Section 1, establish a just and reasonable aggregate charge by a combination from the origin points to Long Island? It did not. It recognized that the exercise of its jurisdiction under Section 1 in the case before it was limited by the plain provisions of paragraph (6) of Section 15 of the act, which conferred upon the Pennsylvania Railroad the substantial right not to be short hauled, and it recognized that substantial right would not and could not be abridged by implication.

In support of this contention that the reasonableness of rates was involved, a new theory is advanced, for the first time, in the briefs of appellees filed in this court, that is, that rates could continue to move over the routes of appellants to Kansas City and the routes

of the varying proportional rate lines beyond, even though the true via such routes be higher than rates via routes in shorthauling appellants.

On page 3 of brief for the United States and the Interstate Commerce Commission, it is said, referring to the restored the varying proportional rate lines:

> "In lieu of heavy step movement doubtless some trip would flow over the routes, but at rates which would be unreasonable and unlawful under the Act."

On page 21of the railroad appellees' brief, it is said:

> "Grant they were entitled to the outbound haul from Kansas City as a matter of law, such an argument would fail, for it nowhere appears that all traffic would move over appellants' rails if the suspended tariffs became effective, and this fact must be proved."

It is not likely that reasons for appellees put forth this contrarily entirely. A complete answer to it is found in the groans and bitter struggle of the railroad appellees to prevent the closing of the routes via their lines. Orders, however, need not be had upon the obvious fact-pleas. Witness J. V. Short, general freight agent of appellee Kansas City Southern Railway, testifies for the Commission (Vol. III, R. 180):

> "The Kansas City Southern Railway does not reach Oklahoma beyond Kansas City but connects there directly with the Kansas City to Fort Worth, and serves no other gulf port, except through connections. If it is to share in the transportation of export grain from Kansas City it must take the same through rates from Kansas City to Fort Worth and to other gulf ports as are made for the same fields to Galveston and Port Arthur."

Again the testimony before the Commission (Vol. III, R. 187):

> "A ship difference in cost and selling price de-

> rates the market to which it will move, and a very slight difference in rates divides the road over which it will move."

Mr. L. S. Ricketts, assistant general freight agent of appellee Chicago and Alton Railroad, testified (Vol. 3[illegible], R. [illegible]):

> "If these rates are permitted to become effective, I think everybody admits, their own witnesses admitted, that we would be prevented, excluded and forbidden forever after to handle any traffic to the gulf from Kansas City."

In the face of the above testimony of their own qualified traffic experts, the argument of counsel that some traffic would continue to move via the restricted routes is wholly without support.

To further support appellees' contention that these proceedings involve the reasonableness of rates, they refer to Fort Arthur, Texas (page 11), railroad appellees' brief), and state that as none of the appellant carriers serve this port with their own rails, the effect of the tariffs promulgated by appellants would be to increase the rates on all grain from points on appellants' lines moving via Kansas City to Fort Arthur for export to such an extent that that port would be left with no rates on export grain from any points on appellants' railroads in Kansas, Colorado and Colorado which would be on a competitive basis with those maintained to Houston and Galveston from the same points of origin.

Further, they state (page 10):

> "Giving the argument all the effect contended for it by appellants, it is still not true as to Fort Arthur, which has no competitive basis of export rates except via the Kansas City Gateway and is not served by any of appellants."

Appellees thus tacitly admit the soundness of appel-

[illegible] position, except in the case of rates to Port Arthur and in that case there is nothing of record to justify their contention.

Appellees would thus inject into these proceedings an issue presented for the first time in the Supreme Court. There was no controversy before the Commission as to rates to Port Arthur versus those to Galveston, Houston or New Orleans. The reasonableness of export rates from points on appellants' lines to the various ports is not involved. For the most part these rates are not even in the record. There is nothing to support the statement that Port Arthur would be left with no rates on export grain from any points on appellants' railroads in Kansas, Nebraska and Colorado which would be on a competitive basis with those maintained to Houston and Galveston from the same points of origin. The matter is still one of routing—whether appellants shall be compelled to short haul themselves by participating in routes of which the Kansas City Southern is a part.

On page 14 of railroad appellees' brief they refer to a rate of 47 cents per 100 pounds from Dodge City to Port Arthur via Kansas City and the Kansas City Southern. Whether that rate applies via other routes is not shown of record and it is not known just what would be the situation were an investigation made as to the volume of rates to Port Arthur from country stations in Kansas [illegible] rates to other Gulf ports.

The Commission, not the court, is the proper tribunal for such an investigation. In this connection it should be borne in mind that appellants generally have shorter and more direct routes from origins on their lines to Gulf ports than those routes which pass through Kansas City, and that prior to 1928 the rates via such direct routes of appellants were lower than their rates [illegible]

via Kansas City. (Ind. T. R. 3.) Therefore, Kansas City became an intermediate station on certain of their routes to Gulf ports only when appellants subsequently placed that point in direct line of transit from certain of appellants' stations, so that even in the case of appellants there is solely the question of the application of a rate from country origin to Gulf ports via certain routes through Kansas City; not the question of the reasonableness of an rate itself.

II.

[illegible]

Appellees contend that the case before the Commission did not involve any question of through routes or joint rates and consequently the order of the Commission did not deprive the appellants of any rights accorded to them by paragraphs (3) and (4) of Section 15 of the Interstate Commerce Act.

The reasoning by which they arrive at this result is somewhat difficult to follow. In the first place, they would apparently draw a complete analogy between the [illegible] and Virginian Railway Company v. United States, 272 U. S. 658. There is no analogy whatsoever. Appellees would create the impression that the Virginia Railway Company relied upon paragraph (3) of Section 15 as a defense against its being short-hauled. (Page 23 of the railroad appellees' brief they say:

> "The Virginian Railroad attacked the order [illegible] contending, in substance, that the authorization [illegible] to the short haul [illegible]"

> coal from mines on its lines to destinations where the Virginian would not get so long a haul as it would get if the coal were going to other destinations."

The Virginian *did contend* that it should be permitted to follow a policy of handling all of its coal traffic eastbound, but in so doing it did not rely upon paragraph (4) of Section 15. To raise the issue of long short haul, the origins and destinations must be common. They were not common in the Virginian case, and not one word is said in that opinion as to any contention of the Virginian under paragraph (4) of Section 15. (See particularly paragraph marked *second* on page 663 of the opinion of this court.) There, the Commission found a reasonable rate between certain origins and destinations and there was no issue at all of short hauling the Virginian contrary to paragraph (4) of Section 15 of the act. Thus the asserted analogy fails.

Apparently the burden of appellees' argument in this regard is that as there are involved here combinations of local and proportional, and proportional and proportional rates, no question of short hauling can arise, because a carrier can be short hauled only by a joint rate. An analysis of such contention will indicate its fallacy.

Paragraph (4) of Section 15 provides that in establishing any such through route the Commission shall not require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad, or canal. In connection with any through route there must be a rate, and appellees take the position that it must be a joint rate. It is true paragraph (5) of Section 15 confers upon the Commission authority to establish through routes and joint rates; but the use of the words "joint rates" in paragraph (5) cannot mean that the through route referred to is per-

agraph (4) must be only a through route accompanied by a joint rate. Such an interpretation would render meaningless the protection of paragraph (4) of Section 15, an intention not to be charged to Congress. By paragraph (4) of Section 15 a substantial right was recognized and that right is not to be destroyed by construction.

The Commission recognized this in *Wichita Board of Trade* v. *A. & S.* 29 I. C. C. 256, wherein it denied a request for the establishment of through routes by way of Wichita for grain from Kansas fields to the South and East through the medium of a general line of proportional rates outbound from Wichita. There the Commission recognized that a carrier can be short hauled by a proportional rate as effectively as by a joint rate and that the protection of the statute extends to both classes of rates. Referring to the above case, on page 22 of the railroad appellees' brief it is stated that it involved a petition asking specifically for the establishment of through routes and no joint rates. Such was not the fact. At page 259 of the Commission's opinion it is specifically stated:

> "Wichita has the transit system on inbound and outgoing lines. It asks that it be given the rate breaking system, and so be placed on an equality with Kansas City in the grain business and the milling business."

In other words, Wichita had joint rates to the destinations involved, it did not want them, it preferred outbound proportional rates. The Commission, however, recognized that the carrier's right to the long haul upon its originated traffic would be violated by the proportional rates asked.

If appellees' contention is correct that a carrier may properly be short hauled by a proportional rate and is

only protected in the case of a joint through rate, what would become of this court's opinion in Missouri Pacific v. United States, supra? After this court by solemn pronouncement upheld the right of the Missouri Pacific to the haul between Memphis and Fort Smith, can it be reasonably contended that the Commission could set at naught this court's opinion and accomplish the same purpose by permitting on shipments from beyond a proportional rate for that part of the movement between Memphis and Fort Smith which, when added to the haul rate up to Memphis, would equal in amount the through joint rate which awarded the Missouri Pacific the long haul upon its traffic? And to carry the analogy a step further, could the Subsidy Railroad itself by the publication of varying proportional rates also set at naught the opinion of this court and accomplish a short hauling of the Missouri Pacific?

Despite the decision of this court, under appellees' construction of the law either the Commission or the Subsidy Railroad could defeat the promised preservation of the rights of the Missouri Pacific.

Likewise, in the *Port of New York Authority case, supra*: Having refused to establish joint through rates from points in Long Island to destinations in the West via the route over the Hell Gate bridge because such route short hauled the Pennsylvania, could the Commission have given pretended deference to the statute by refusing to establish such joint through rates and still have accomplished lawfully the same purpose by prescribing proportional rates from the end of the Hell Gate bridge, which when added to the haul rates of the Long Island and the New York Connecting Railroad would exactly equal in amount the joint through rates as demanded and refused?

Appellees have not received their long haul upon the traffic in question when it reaches Kansas City.

The contention of appellees that appellants have received their long haul when the traffic reaches Kansas City deserves but scant attention.

They point out at great length that upon the arrival of a shipment of grain at Kansas City it is delivered into an elevator and say the transportation service of the originating line is then complete and it is entitled to no further haul. Speaking of this grain, they state at page 5 of the Railroad Appellees' brief:

> "As a matter of fact, it completely loses its identity, and is shipped out on a proportional or reshipping rate only on the production of proof by the shipper that he has shipped an equal amount into Kansas City."

The brief of the United States and the Interstate Commerce Commission contains the same error. At page 30 of that brief it is stated:

> "As to most of the grain moving, then, there is, in reality, loss of identity on reaching Kansas City and it is only by the fiction of matching bills that any continuity of movement is shown (*United R. R. v. United States*, 257 U. S. 247, 257), that is, the shipper from Kansas City, in order to secure the lower proportional outbound rate, produces bills showing he had shipped into Kansas City a like amount of grain."

The above quotations would leave an inference that in order to use the varying proportional rates of the outbound lines all that is necessary is to show an inbound movement into Kansas City of a like amount of grain. It is not pointed out, as it should be, that such a showing does not suffice. For illustration, to apply the varying proportional rate of 20.5 cents from Kansas City to Galveston there must be surrendered not any inbound bill for a like amount of grain, but a bill from

Dodge City, Kansas, which takes a local rate of 20.5 cents to Kansas City and a 47-cent rate to Galveston, or a bill from some other point as to which the difference between the rate inbound to Kansas City and the direct rate to the Gulf would equal the varying proportional rate desired to be applied.

On page 21 of the railroad appellees' brief it is stated:

> "Appellants' claim to the outbound haul must rest upon some connection between the inbound and outbound hauls, and as a matter of fact, there is no such connection."

What greater connection could there be when both the volume and the applicability of the varying outbound proportional rate depends, not upon any prior movement into Kansas City but upon prior movement from a specific point? To sustain the applicability of the outbound rate there must be assumed a through and continuous movement from first point of origin to final destination, and its volume depends upon the particular point from which it moved to Kansas City. Kansas City is but an intermediate point via some of the routes and all of the appellants have reasonably direct lines for the further movement from Kansas City to the Gulf. If this is free grain at Kansas City the varying proportional rates do not apply. If this is not free grain at Kansas City this is a case of compulsory short hauling in violation of the rights of appellants, however ingenious the device by which it is accomplished.

In this reply brief reference has been made only to the Kansas City situation for the reason that it alone was dealt with by appellees. While appellants have shown that a carrier may be short hauled by a proportional rate as well as by a joint through rate, it will be pointed out that the situation at Wichita is not exactly

the rates to or from Kansas City. At Wichita there never had been either joint rates through that point or proportional rates outbound. The Commission, the District Court, and all of appellees are silent as to the Wichita situation.

Appellees in their brief do not answer appellants' contention that the order of the Interstate Commerce Commission was made without competent evidence to support it. Railroad appellees merely state on page 30 of their brief that any inconsistency between the Commission's opinion in this proceeding and its opinion in Grain and Grain Products, 233 I. C. C. 555, is of no importance even if inconsistent. In this connection appellants refer to page 35, part IV, of their original brief in this court.

Conclusion.

The order complained of requires appellants to participate in a through route which does not build them. The law is clear that a proportional rate may have this unlawful effect. Once the publication of such proportional rates they have no control. When proportional rates about hauling them were published and not suspended by the Commission, they had no recourse but to give a proportional application to their inbound rates when used in connection with the proportional outbound rates established against them by other carriers. Up to that point they were able to take care of themselves, but when the Commission stepped in and suspended their inbound rates, the Commission directly, not indirectly, required their continued participation in rates about hauling themselves. It is held that the Commission could do this under the guise of passing upon the reasonableness of a rate via an existing route would render the protection of paragraph (6) of Section 15 wholly

[redacted] and [redacted]. This would mean that in every case where the Commission has refused to establish through routes and joint rates because of the short-haul provision, it might have avoided the limitation of that provision by acting under the guise of adjusting the reasonableness of a rate. It would mean that the right of the Missouri Pacific Railroad recently upheld by this court could now be taken from it merely by a slight change in the wording of the Commission's order. This court is asked to protect the substance of appellants' rights, not their shadow.

Respectfully submitted,

[redacted],
[redacted],
[redacted],
Attorneys for Appellants.

[redacted],
[redacted],
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SUBJECT INDEX

	Page
OPINIONS	1
JURISDICTION	2
QUESTIONS	2
STATUTES	3
STATEMENT	8
SUMMARY	14
ARGUMENT	16
I. Paragraph (4) of Section 15 of the Act constitutes a restriction only upon the Commission's authority to establish through routes, and the Commission's order was neither one establishing through routes nor one requiring the carrier to maintain through routes	16
1. Appellants' proposed proportional rates, canceled by the Commission's order, were unreasonable and unlawful under Section 1 (5) of the Act	16
2. The proposed proportional rates constituted a proffer by appellants to participate in the through service and, therefore, the Commission's order neither established through routes nor required appellants to continue to participate in through routes theretofore established	20
3. The regulation of rates is such an important part of the Commission's duties under the Act that there should not be read into paragraph (4) anything that would restrict the Commission in exercising an unhampered administrative judgment in respect of the proper level thereof	24
a. While through routes were and are in existence, the break in the movement of the principal part of the traffic at Kansas City and Wichita is of such character that appellants are not entitled to the further haul in respect thereof under any view of paragraph (4)	29
CONCLUSION	34

TABLE OF CASES CITED

Central R. R. Co. v. *United States*, 257 U. S. 247	30, 31
Hughes Creek Coal Co. v. *Kanawha & Mich. Ry. Co.*, 29 I. C. C. 376	27
Interstate Comm. Comm. v. *Nor. Pac. Ry. Co.*, 216 U. S. 538	27
Kansas City Board of Trade v. *A., T. & S. F. Ry. Co. et al.*, 69 I. C. C. 185	22

	Page
Lemon Cove-Woodlake Asso. v. A., T. & S. F. Ry. Co., 139 I. C. C. 239	27
Ogden Gateway Case, 35 I. C. C. 131	25
Port of New York Authority v. A., T. & S. F. Ry. Co. et al., 144 I. C. C. 515	27
Restriction in Routing of Traffic, 73 I. C. C. 305	25
United States v. Mo. Pac. R. Co., U. S. Sup. Ct., No. 19, Oct. Term, 1928, decided January 2, 1929, 73 L. Ed.	27, 28
Wichita Board of Trade v. A., T. & S. F. Ry. Co., 29 I. C. C. 376	26
Virginian Ry. Co. v. United States, 272 U. S. 658	28, 32, 33

STATUTES CITED

Commerce Court Act of 1910 (36 Stat. 539)	
Interstate Commerce Act (24 Stat. 379) as amended by Transportation Act, 1920 (41 Stat. 456)	3
Section 1 (5) (34 Stat. 584)	3, 18, 24
Section 15 (1) (41 Stat. 484)	3
Section 15 (3) (41 Stat. 484)	3, 21
Section 15 (4) (41 Stat. 484)	5, 16, 21, 24
Section 15 (7) (41 Stat. 484)	6, 19, 24
Urgent Deficiencies Act (38 Stat. 219)	2

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 466

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY Company, the Chicago, Rock Island and Pacific Railway Company, and Missouri Pacific Railroad Company appellants

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE Commission, the Kansas City Southern Railway Company, et al. appellees

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the specially constituted District Court (Circuit Judge Evans and District Judges Carpenter and Wilkerson) is not reported but will be found in the record. (R. 54.)

The report of the Commission appears as *Grain and Grain Products from Colorado, Kansas, and*

Nebraska to Gulf Ports for Export, 129 I. C. C. 261. (R. 19.)

JURISDICTION

The suit was commenced on November 30, 1927, under the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219; U. S. C. Title 28, Sec. 47) to enjoin, set aside, annul and suspend a certain order of the Interstate Commerce Commission dated July 6, 1927, which required certain carriers to cancel proposed proportional rates on grain and grain products from points in Colorado, Nebraska and Kansas to Kansas City, Missouri-Kansas, and from points in Kansas to Wichita, Kans., destined to Gulf ports for export, which proportional rates are in excess of the local rates now applicable for the corresponding portions of the through movements to the Gulf ports. (R. 1-18.)

On June 4, 1928, the final decree of the court below was entered, dismissing the bill of complaint for want of equity. (R. 58.) On June 22, 1928, the appeal was allowed. (R. 62.)

QUESTIONS

Where a tariff is filed proposing a new rate for application over a portion of a through movement, which new rate is in excess of the local rates now applicable for the same portion of the through movement and would bring about an increased total charge for the entire movement, does the fact that the asserted purpose of the carriers (R. 12, 13, 72) in proposing the increased rate was to force traffic

from that route to other routes, wherein they enjoyed longer hauls, to which they claim to be entitled under section 15 (4) of the Act, deprive the Commission of its authority and relieve it of its duty to deal with that new rate from the standpoint of whether or not it is a reasonable charge for the service in respect whereof it is applicable?

STATUTES

Section 1 (5) of the Interstate Commerce Act (34 Stat. 584) reads in part as follows:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * *.

Pertinent paragraphs of section 15 of the Interstate Commerce Act (41 Stat. 484) reads as follows:

> (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject

to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

(4) In establishing any such through route the Commission shall not (except as

provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through rate which could otherwise be established: *Provided*, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once,

and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension, as above stated, the Commission may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period, but, in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require

the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

STATEMENT

Appellants, Missouri Pacific Railroad Company, Atchison, Topeka & Santa Fe Railway Company and Chicago, Rock Island & Pacific Railway Company, hereinafter called the Missouri Pacific, the Santa Fe and the Rock Island, respectively, originate on their lines in Colorado, Kansas and Nebraska a considerable traffic in grain and grain products destined to the gulf ports for export. Certain of the traffic moves via Kansas City and

certain of the traffic originating in Kansas moves via Wichita and where the movements are so routed the grain is frequently stopped in transit at those cities for storing, cleaning, clipping, elevating, or milling into products. The inbound movements to Kansas City and Wichita are over the lines of the appellants originating the traffic and, moreover, the outbound movements of the grain or its products are, whenever they are so routed, likewise over the lines of said appellants, thereby giving them a longer haul to the extent that their lines reach to or toward the ports to which the traffic is destined. The outbound shipments to the ports may, however, be routed over the lines of certain other carriers, reaching Kansas City and Wichita from the south or east, in which case, of course, the hauls enjoyed by appellants terminate at those cities.

In addition to the routes via Kansas City and Wichita appellants have other and generally speaking more direct routes from points of origin, in which their own lines figure, in some cases all of the way, and in other cases most of the way, to the destination ports. Prior to 1924 the rates over those direct routes of appellants were generally lower than rates applying via Kansas City, which latter were made up of the inbound local rate to Kansas City plus a proportional rate of 30.5 cents per 100 pounds beyond. This proportional rate for the outbound movement was standard, that is, it then applied whether the shipment beyond Kansas City

was routed over appellants' lines or over the lines of the competing carriers just above mentioned. In 1924 appellant Missouri Pacific established lower one factor rates via Kansas City with transit privileges at that point, which rates applied only where the traffic was routed so as to give both the outbound movement from Kansas City, as well as the inbound movement, to said appellant's lines. Thereafter the other appellants, the Santa Fe and the Rock Island, established similar rates applicable in respect of their lines. These new rates over appellants' lines via Kansas City were established by them at the same level as the rates applicable over their aforementioned more direct routes from origins to the gulf ports. The transit privileges under said new rates permitted the shipper upon payment of the inbound local rate to Kansas City to stop the grain for storing, cleaning or milling, and subsequently to ship the grain or its products to the destination port at a charge merely representing the difference between the charge paid inbound and the through charge applicable from first point of origin to the destination port. There thus became available from Kansas City over the lines of the appellants an outbound charge lower than the standard proportional rate of 30.5 cents applicable over the lines of its competitors and theretofore applicable over the lines of the appellants. Appellants' competitors out of Kansas City thereupon met this change by substituting in lieu

of the standard proportional rate on the outbound traffic from Kansas City varying proportional rates, that is rates which varied in amount, depending upon the point of origin of the traffic and equalled the balance of appellants' through one factor rates after deduction of the local inbound rates. This again placed the charges for the entire movement upon a basis of equality whether the reshipment from Kansas City was over the lines of appellants or over the lines of its competitors. Appellants did not attempt to regain their advantage by still further reducing rates as applicable over their own lines but instead resorted to another method to ensure that the outbound movement, after storing or milling, should be over their own lines. They filed schedules proposing to establish new proportional rates from points of origin to Kansas City higher than the existing local rates, which new higher inbound rates were to apply when the outbound movement from Kansas City was routed over the lines of their competitors instead of over the lines of appellants.

At Wichita the situation, while in principle the same, differed from that at Kansas City in that prior to 1926 there had been no proportional rates for the portion of the movement from Wichita to the Gulf. The basis over appellants' lines to Wichita in connection with its competitors [1] beyond

[1] The Kansas City, Mexico & Orient Railway Company and Midland Valley Railroad Company and their connections.

had been the full combination of local rates to and from Wichita. In 1926 appellants' competitors out of Wichita published proportional rates from Wichita to Galveston, Houston and Texas City applicable upon grain coming into Wichita over appellants' lines from beyond. Similarly as at Kansas City those proportional rates varied in amount depending upon point of origin of the traffic and equalled the balance of the direct through charge on movements all the way over appellants' lines after deduction of the local inbound rates. Similarly, too, as at Kansas City appellants thereafter sought to regain their advantage, not by reductions of rates for the through movement over their own lines, but by filing schedules proposing proportional rates from origins to Wichita higher than the existing local rates for application when the outbound movement from Wichita to the ports was routed over the lines of their competitors instead of over appellants' lines.

The proportional rates as proposed both via Kansas City and via Wichita would, of course, have resulted in higher charges for the through movement when made in connection with appellants' competitors than those theretofore obtaining and higher than appellants' prior rates for that part of the movement over their own lines. Upon protest of certain of appellants' said carrier competitors, the Wichita and Kansas City Boards of Trade and others the schedules were suspended by the Commission. This action was taken under section 15

(7) of the Act, which contains a provision placing the burden of proof upon the carrier to show proposed increased rates or charges are just and reasonable. At the hearing before the Commission appellants made no attempt to show the rates to be just and reasonable for the service for which they were applicable. (R. 23.) They relied instead upon the contention that they were entitled under the terms of section 15 (4) to establish higher proportional rates for application over routes wherein they had a lesser haul in order to secure the traffic for routes in which they had a longer haul. (R. 22.) The provisions of said paragraph (4) relied upon are to the effect that the Commission, in establishing any through route shall not require a carrier, without its consent, to embrace therein substantially less than the entire length of its railroad lying between the termini of the through route. The Commission found that the carrier had not justified the proposed proportional rates and entered an order requiring their cancellation. (R. 24.)

Appellants then filed their bill of complaint asking that the Commission order be enjoined. (R. 1.) Reasons advanced in support thereof are in substance that the order is invalid because compliance therewith would deprive appellants of rights secured to them by the aforementioned paragraph (4) of section 15. (R. 16.) The District Court, by final decree, dismissed the bill for want of equity. (R. 58.)

SUMMARY

I. Appellants' increased rates proposed for part of the through movements were established as unreasonable and unlawful under Section 1(5) of the Act: (1) because the statute cast the burden of proof on appellants to show new increased rates to be just and reasonable and, instead of meeting that burden, appellants' position in the Commission proceeding, in the lower court, and in their brief before this court, has been and is that the unreasonableness of the rates was not in issue because the purpose of the increases was to close the through route, and (2) because they were higher even than the existing rates as applicable for local service.

II. Since they were established as unreasonable and unlawful rates for the service for which they were applicable, the sole remaining question is as to whether the provisions of Section 15(4) that the Commission may not establish through routes which will require a carrier to embrace therein less than its long haul so restricts the Commission's authority over the level of rates that it can be exercised only where it will not tend toward holding traffic to the one through route and toward restricting movement over another through route in which appellants have a longer haul.

III. Since the proposed increased rates were proportional rates applicable only if the traffic is to move beyond over the through routes, they constituted a proffer by appellants to participate in the through service and, therefore, the Commission's

order, cancelling the schedules, neither established through routes nor required appellants to continue to participate in through routes theretofore established.

IV. Appellants' contention that the Commission's rate authority is controlled and restricted by paragraph (4) is not borne out by the terms thereof and since the regulation of rates is the chief function of the Commission under the Act, anything that would hamper the Commission's free administrative judgment in respect thereof should not be read into the paragraph.

V. Although through routes were and are in existence, the break in the movement of the principal part of the traffic at Kansas City and Wichita is of such character that appellants are not entitled to the further haul in respect thereof under any view of paragraph (4).

VI. The proposed schedules would have placed appellants in the position of proffering service at rates, which although unreasonable and unlawful, they would have been bound to collect for any traffic moving. Their position that the rates were intended, not as reasonable rates, but to stop traffic would have placed upon the Commission the impossible duty of determining whether they would certainly have had that result.

ARGUMENT

I. Paragraph (4) of Section 15 of the Act constitutes a restriction only upon the Commission's authority to establish through routes and the Commission's order was neither one establishing through routes nor one requiring the carrier to maintain through routes.

1. Appellants' proposed proportional rates, cancelled by the Commission's order, were unreasonable and unlawful under Section 1 (5) of the Act.

At the close of their brief appellants claim that the Commission's action was not supported by evidence, but it is apparent that they rely mainly on contentions which are in substance that the Commission's jurisdiction to determine what is the proper level of a carrier's rates applicable in respect of part of a through route can not, because of section 15 (4), be exercised where it may tend toward holding traffic to that route and toward restricting its movement over another through route in which the carrier enjoys a longer haul. That this was likewise the position taken by appellants in the lower court appears from the following excerpt from the opinion:

> In the course of the argument, plaintiff's counsel frankly admitted, upon question from the court, that their attack upon the order of the commission was based solely and entirely upon a lack of authority upon the part of the Commission to make the order complained of. To support this position counsel for plaintiffs insisted that para-

graph 4 of section 15 constitutes a limitation upon the Commission's power to regulate rates. (R. 57.)

In paragraphs XI, XII, and XV of the bill, in referring to rates covered by the order of July 6 and in construing the provisions of said paragraph (4), it is, among other things, alleged:

> Plaintiffs further aver that the level of the inbound proportional rates was and is not material, because they were published, not for the purpose of facilitating movement via the routes in connection with which they were published, but were published by plaintiffs to preclude and prevent movement via such routes, and to confine the movement from country points of origin in Kansas, Colorado and Nebraska upon the lines of plaintiffs to routes affording plaintiffs a haul over substantially the entire length of their lines. (R. 12–13.)
>
> That in so far as the reasonableness of the inbound proportional rates of your petitioners from stations in Kansas and Colorado to Wichita, Kansas, is concerned, such question of reasonableness is immaterial as petitioners published said rates not for the facilitation of the movement of traffic, but to preclude and prevent the movement of grain and grain products from stations on their lines in Kansas and Colorado to Gulf ports for export via Wichita, Kansas, and the lines of the Kansas City, Mexico & Orient Railway Company and connections and the Midland Valley Railroad Company

> and connections, and to confine the movement of such grain and grain products from such stations to routes affording petitioners a haul over substantially the length of their entire lines, at substantially lower rates, which were not before the Commission as being unreasonable or otherwise unlawful in I. & S. Docket 2813. (R. 13-14.)
>
> * * * the Commission is without jurisdiction of the level of such rates made solely for the purpose of confining traffic within proper and lawful channels and thus securing to the originating carrier its lawful rights; and that any order of the Commission condemning such rates upon the alleged grounds of their improper, unlawful, or unreasonable level is null and void, and constitutes a usurpation of the authority expressly denied the Commission in paragraph (4) of Section 15 of the Interstate Commerce Act. (R. 16.)

It will be seen that the allegations contained in these quotations from the bill disclose that the rates ordered cancelled by the Commission were not proposed by appellants with any thought of establishing reasonable rates for the service for which they were to be applicable, that is, reasonable rates within the meaning of the provisions of section 1 (5) that—

> All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall

> be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * * .

That appellants' action in proposing the rates was not with a view to complying with the Act's provisions just above quoted is further borne out by the statement in the Commission's report that—

> Respondents have made no attempt to justify the proposed inbound proportional rates in and of themselves. (R. 23.)

The proceedings before the Commission was what is known as an Investigation and Suspension proceeding governed by paragraph (7) of Section 15 of the Act, which paragraph contains a provision relating to the burden of proof, reading as follows:

> * * * At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, * * *.

The rates involved were rates sought to be increased after the passage of the 1910 amendment whether regarded from the viewpoint of increase of the rate for that part of the through movement for which they were applicable or from the viewpoint of the resulting increased through charge. The statute cast the burden of showing that the increase was just and reasonable upon the appellants, but

appellants' justification, if such it may be called, was, not that the rates were reasonable in and of themselves, but, in effect, that they did not have to be reasonable because their purpose was to close the through route for which they were applicable to the end of securing to appellants the longer haul, to which they claimed to be entitled under section 15 (4).

Since then the statute casts the burden upon the carrier to show increased rates just and reasonable and appellants, instead of meeting that burden, have taken the position throughout that the reasonableness of their rates was not in issue because the purpose of the increase was to close the through route, it is submitted that the Commission had to regard the rates as in law unjust and unreasonable within the meaning of section 1 (5), particularly since they were higher even than the existing rates applicable for local service. There remains, then, solely the question as to whether the Commission's authority to disallow rates intended for part of a through movement that are unreasonable for the service for which they are applicable, can be exercised only where it will not tend toward holding traffic to that through route and toward restricting the movement over other through routes in which the carriers have a longer haul.

2. The proposed proportional rates constituted a proffer by appellants to participate in the through service and, therefore, the Commission's order cancelling the schedules neither established through

routes nor required appellants to continue to participate in through routes theretofore established.

As above explained this controversy turns upon the extent to which the Commission's rate authority is restricted by paragraph (4) of section 15, and for a full understanding of paragraph (4) it should be read together with the preceding paragraph (3). Pertinent portions of those paragraphs in their proper order read as follows:

> (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, * * * establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, * * * and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; * * *.
>
> (4) In establishing any * * * through route the Commission shall not * * * require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: * * *. (R. 12.)

An examination of the restriction in paragraph (4) shows that it is in terms confined to orders of the Commission which require carriers, without their consent, to establish through routes. The Commission has itself held in decisions which will be later discussed that, in situations where it could not in the first instance have required a carrier to join in through routes without its consent, it could not prevent its withdrawal therefrom. But the Commission's order neither establishes through routes nor requires the carriers to continue to participate in through service. On the contrary it cancels proposed proportional rates which in their very nature constitute a proffer to participate in the through service, since, while they are only for the portions of the movements to Kansas City or Wichita, they are, nevertheless, applicable only where the traffic moves beyond to the gulf ports. Section 6 (13) (c) contains a definition of proportional rates, which although specifically applicable only in respect of rail and water movements, nevertheless shows what is meant by proportional rates generally. And in any event appellants' brief quite frankly admits the nature of proportional rates and in effect that the ones proposed by them apply only when there is an outbound movement from Kansas City or Wichita and that outbound movement is over the lines of their competitors rather than their own. In this connection they quote from *Kansas City Board of Trade* v. *The*

Atchison, Topeka and Santa Fe Railway Company, et al., 69 I. C. C. 185, as follows:

> We have in numerous cases considered reshipping and proportional rates, by whatever name called, and it is well settled that they are inseparably connected with and form parts of the rates applying to through transportation. A proportional rate means a part of, or the remainder of, a through rate, or it means nothing at all.

An order, then, cancelling proportional rates proposed by appellants whereby they are proffering their service for portions of through routes is not an order establishing through routes within the terms of paragraph (4) or one contravening the principle previously announced by the Commission that it should not prevent a carrier's withdrawal from through routes where in the first instance it could not have required it to join therein. Appellants claim, however, that the practical effect of preventing them from establishing the higher rates for their part of the movement is to require them to continue to participate in the through service. In short they read into paragraph (4) restrictions upon the Commission's administrative judgment as to what constitutes the reasonable level of rates. It seems to us that on the contrary the paragraph relates exclusively to the service or physical elements involved in through routes. Joint rates bear a close relationship to paragraph (4) but, only in so far as a Commission order requiring their estab-

lishment or maintenance may be said likewise to require a carrier to establish or maintain through routes.

3. The regulation of rates is such an important part of the Commission's duties under the Act that there should not be read into paragraph (4) anything that would restrict the Commission in exercising an unhampered administrative judgment in respect of the proper level thereof.

Since the regulation of rates was, and still is, the outstanding objective of the Interstate Commerce Act it would seem that exceptions tending to restrict the Commission's free administrative judgment as to what constitutes the reasonable level of rates should only be found where expressed in plain terms. Within its own terms paragraph (4) makes no mention of rates and if it is to be construed as a restriction upon any rate power of the Commission it seems reasonable to suppose that it is that power contained in the immediately preceding paragraph (3) whereby, as above shown, the Commission is empowered to establish both through routes and joint rates. In that preceding paragraph no mention is made of any individual rates, as is the case in paragraph (1) of section 15. And that fact is significant. Paragraph (1), we believe it may be properly said, deals with the level of the rate, whether individual or joint, while paragraph (3) authorizes the Commission to establish rates of a particular kind, namely, joint rates with the elements of through service that are a necessary in-

cident of joint rates. While through routes may exist without joint rates, joint rates can not exist without cooperation of some kind between the carriers in the rendering of through service. If, therefore, paragraph (4) is given the normal construction attributable to it, as immediately succeeding paragraph (3) and as being inseparably related thereto in its subject matter, it seems certain that in so far as it is a restriction upon the rate power of the Commission it was intended only as a restriction upon the rate power given by paragraph (3), and that means that it was in no wise intended to confine the administrative judgment of the Commission as to what constitutes the proper level of rates, but was merely intended to restrict it in establishing joint rates, because through routes, which alone are mentioned in the restricting paragraph (4), are a necessary incident to joint rates.

The above analysis of the scope attributable to the limitation upon the Commission's authority to establish through routes will demonstrate why the Commission's action in certain joint rate cases mentioned by appellants is not inconsistent with its order in this case. In the *Ogden Gateway Case*, 35 I. C. C. 131, in *Restrictions in Routing of Traffic*, 73 I. C. C. 305, and in other cases the Commission has approved schedules whereby carriers proposed to restrict the applicability of joint rates in which they participated to through routes in which they had the longer haul over the protests of shippers and others that the combinations of local rates

which would thereafter apply over the through route, which had in effect been withdrawn, were unreasonable rates for the through movement. What has been said, we believe, will have made clear that withdrawal from joint rates under the right given carriers by paragraph (4) is not a matter of the level of rates but is, in so far as the Commission's authority may be exerted, a matter of the through service. The local rates remaining in effect were presumably reasonable for the local service. In short the above mentioned decisions of the Commission were predicated upon the view that paragraph (4), although speaking only of through routes, was likewise a restriction upon the rate power given by paragraph (3), but, since paragraph (3) does not deal with the level of rates, that meant merely a restriction upon the power to establish the kind of rates mentioned in paragraph (3), namely, joint rates, which when ordered, carry with them the necessary incident of through service.

The case of *Wichita Board of Trade* v. *A., T. & S. F. Ry. Co.*, 29 I. C. C. 376, cited by appellants, is by their own quotation therefrom shown to be one wherein the Commission was directly asked to establish through routes. That quotation reads in part:

> The complaint is a request to the Commission to establish all possible through routes by way of Wichita for the transportation of grain from Kansas fields to the south and east.

The other cases cited by appellants, that is, other than that class of cases above dealt with where the carriers withdraw their concurrence in joint rates, were all cases either to establish through routes, to establish through routes and joint rates, or to establish joint rates, as to which latter through routes, as above said, are a necessary incident. *United States* v. *Missouri Pac. R. Co.* (known as the *Subiaco case*), United States Supreme Court, No. 19 October Term, 1928, decided January 2nd, 1929, 73 L. Ed. —; *Interstate Commerce Commission* v. *Nor. Pac. Ry. Co.*, 216 U. S. 538; *Port of New York Authority* v. *A., T. & S. F. Ry. Co. et al.*, 144 I. C. C. 515; *Lemon Cove-Woodlake Asso.* v. *A., T. & S. F. Ry. Co.*, 139 I. C. C. 239; *Hughes Creek Coal Co.* v. *Kanawha & Michigan Ry. Co.*, 29 I. C. C. 376. They thus directly involved the restriction upon the Commission's authority to establish through routes, or otherwise stated, to require a carrier, without its consent, to cooperate in the through service.

While an order to establish joint rates carries with it an incidental requirement to join in through service that is not true in respect of any individual rate of the carrier, whether local or proportional. Appellants admit this by stating in effect that, while proportional rates assume either that there has been a prior movement or that there will be a further movement, no concurrence is obtained from other carriers. Naturally, if concurrence were obtained, the rates would then become joint rates.

This is the important distinction, that is, that the proportional rate is still an individual rate, carrying with it no requirement upon other carriers to join in the through service. This distinction between individual and joint rates, it seems to us, is brought out in *Virginian Ry.* v. *United States*, 272 U. S. 658, which will later be discussed in more detail. There it was asserted that an order of the Commission which in reality dealt only with the level of the rate was an order establishing through routes and joint rates without the prerequisite finding of public interest. The decision after pointing out that the order neither established through routes nor joint rates stated at page 667:

> * * * The Commission found that the combination rate was both unreasonable and discriminatory. It prescribed through rates which it found were reasonable and nondiscriminatory. It did not order joint rates. And no question of divisions was before the Commission. The order was sought and made under section 1 and section 3. * * *.

In *United States* v. *Missouri Pac. Ry. Co., supra*, the Commission had interpreted paragraph (4) of section 15 as protecting only the long haul of a carrier after it had obtained possession of the traffic. It was held that this construction was not permissible under the language of the paragraph. Similarly in the instant case it would seem that the paragraph should be confined to its terms, particu-

larly since the interpretation sought by appellants would place restrictions upon the administrative judgment of the Commission in performing its important function of determining the reasonable level of rates.

> a. While through routes were and are in existence, the break in the movement of the principal part of the traffic at Kansas City and Wichita is of such character that appellants are not entitled to the further haul in respect thereof under any view of paragraph (4).

Appellants lay great stress on the claim that the method adopted of filing the higher proportional rates for their part of the movement is the only practical course whereby they can secure to themselves the rights to the long haul given them by paragraph (4), that is, in effect, that they had to make it a matter of rates and publish unreasonable rates for the route they wished to close because it was impractical to withdraw from the through route from a service point of view. The reason given by them to show that they can not close the through routes from the standpoint of service it seems to us disclose convincingly that, as to the movements to which they refer, paragraph (4) was never intended to entitle them to any further haul than that they are now enjoying.

The grain moves into Kansas City under appellants' local rates and at that time the ultimate

destination may not have been determined upon. (R. 226, 228.) It is there stored in elevators and may be clipped, cleaned or milled into products. Frequently it changes ownership. (R. 176–178, 229.) If on arrival in Kansas City it is stored in an elevator on the tracks of appellant it will ordinarily be reshipped over appellant's lines. But often it will move into Kansas City on the line of one carrier and be stored in an elevator on the line of another, that is, the originating carrier delivers to a connecting carrier which switches the grain to the elevator. The former collects its local rate and the latter its switching charge. Upon reshipment the outbound carrier and not the originating carrier absorbs the switching charges. (R. 174–175, 183, 98, 227.)

As to most of the grain moving, then, there is, in reality, loss of identity on reaching Kansas City and it is only by the fiction of matching bills that any continuity of movement is shown (*Central R. R.* v. *United States*, 257 U. S. 247, 257), that is, the shipper from Kansas City, in order to secure the lower proportional outbound rate, produces bills showing he had shipped into Kansas City a like amount of grain. (R. 101, 211, 227, 229, 231.)

Unquestionably as found by the Commission, there were through routes in existence "the status whereof would not be affected by the suspended

inbound proportional rates." The significance of this finding is that the Commission's order cancelling the proposed proportional rates, whereby appellants in effect offered to continue its participation in the through routes, did not require the carrier to establish through routes without its consent or prevent its withdrawal therefrom. While it doubtless was appellants' purpose to close the through routes it can not be said that that would be the result under the act when they would in fact be open under published tariff rates. But even though the routes are open and available for traffic it would seem that much of the traffic is transported by two separate and distinct movements. *Central R. R. Co.* v. *United States, supra.* If a shipment of grain into Kansas City is a completed transportation it can not be said that paragraph (4), viewed from any angle, ensures appellants the outbound movement.

Appellants' view that paragraph (4) places a restriction upon the Commission's administrative judgment as to what constitutes the reasonable level of rates seems an impossible construction. If the Commission had approved appellants' schedules the rates would have been the applicable tariff rates, although unreasonable, which the carrier would have been obliged to collect. The carrier would be holding itself out to render the service and it can not be assumed that no traffic would have been

offered. In times of heavy crop movement doubtless some traffic would flow over the routes, but at rates which would be unreasonable and unlawful under the Act. Appellants' construction, therefore, would place upon the Commission the additional duty of determining whether the rate level fixed by appellants would certainly stop all movement at the unlawful charges. Also their proposed proportional rates would result in confusion and open the way to evasion of applicable legal charges. (R. 228–229.)

Furthermore it will be seen that where a reshipment from Kansas City is to a northern destination no attempt to control the routing beyond Kansas City is made. In such a case the lower local rate from point of origin to Kansas City is applied as a matter of course. (R. 96, 180.)

We believe that the appellants' contentions are answered by the decision of this Court in *Virginian Ry. Co.* v. *United States, supra.* There, as here, the Commission order dealt with individual rates applicable for through service, and required the carrier to cease and desist from charging existing rates found unreasonable and discriminatory and to establish in lieu thereof rates which were not to exceed rates specified in the order. It was urged among other things that this order was void because directing the establishment of through routes and

joint rates without the finding of public interest required by section 15 (3). As to this the opinion reads at page 66:

> The Virginian contends that the order is void because the Commission directed the establishment of through routes and joint rates without finding that they are necessary in the public interest. Such a finding is essential to the validity of an order under section 15 (3). But the order here in question was not sought or made under section 15 (3) and does not direct the establishment of through routes and joint rates. Through routes to the West were already in existence. And there were through rates by combination. * * * The fact that the combination rates were excessive constituted the only obstacle to the movement. The Chesapeake & Ohio did not oppose the reduction of its rates from the junction to the West. It was willing that these 54 mines on the Virginian should enjoy the rates already open to the other 45. The Virginian resisted a reduction of its local rate to the junction. The Commission found that the combination rate was both unreasonable and discriminatory. It prescribed through rates which it found were reasonable and nondiscriminatory. It did not order joint rates. And no question of divisions was before the Commission. The order was sought and made under section 1 and section 3. * * *.

CONCLUSION

The decree of the lower court denying the prayer for injunction and dismissing the bill for want of equity should be affirmed.

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Office Supreme Court
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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. 466

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

BRIEF ON BEHALF OF KANSAS CITY SOUTHERN RAILWAY COMPANY, TEXARKANA AND FORT SMITH RAILWAY COMPANY AND WILLIAM W. WHEELOCK AND WILLIAM G. BIERD, RECEIVERS OF THE CHICAGO AND ALTON RAILROAD COMPANY, APPELLEES.

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Counsel for said Appellees.

INDEX.

	Page
Statement	1
Opinions in courts below	6
Summary of argument	7
Argument:	
1. The issue before the Commission was one involving the reasonableness and justness of proposed increased rates. The Commission, therefore, had jurisdiction, and its decision was correct	8
2. The case before the Commission did not involve any question of through routes or joint or through rates, and consequently the order of the Commission did not deprive appellants of any rights reserved to them by Paragraphs 3 and 4 of Section 15 of the Interstate Commerce Act	17
(a) The filing of the suspended tariffs by appellants did not raise any issue of through routes or joint rates	17
(b) The power of the Commission to deal with the proposed increased rates under Sections 1 and 15 of the Interstate Commerce Act is not limited or destroyed by the provisions of Paragraphs 3 and 4 of Section 15	27
(c) In any event, appellants have received their long haul upon the traffic involved when it reaches Kansas City	29
3. The order of the Interstate Commerce Commission is not arbitrary and does not exceed the jurisdiction conferred upon the Commission	32
Conclusion	34

Table of Cases Cited.

Assigned Car Cases, 274 U. S. 564 33
Atchison Board of Trade v. Carriers, 80 I. C. C. 350. 12
Basing Rates on Paving Brick, 100 I. C. C. 390 12
Cairo Board of Trade v. Carriers, 46 I. C. C. 343 12
Central R. R. etc. v. U. S., 257 U. S. 247 19
Export Rates on Grain, etc., 31 I. C. C. 616 3
Grain and Grain Products, etc., 115 I. C. C. 153 34
Hocking Valley R. Co. v. Lackawanna etc. Coal Co., 224 Fed. 930 ..... 12, 16
I. C. C. v. Union Pacific Ry. Co., 222 U. S. 541 33
I. C. C. v. Northern Pac. Ry. Co., 216 U. S. 538 21
Kansas City Board of Trade v. Carriers, 69 I. C. C. 185 16
Lemon-Cove-Woodlake Ass'n. v. Carriers, 139 I. C. C. 239 22
L. R. & M. R. Co. v. East Tennessee etc. Co., 47 Fed. 771 21
Lumber from San Francisco Bay Points, 78 I. C. C. 162 16
Nashville etc. Ry. v. Tennessee, 262 U. S. 318 28
Ogden Gateway Case, 35 I. C. C. 131 22
Petroleum and Petroleum Products, 78 I. C. C. 162 .. 12
Proportional Rates on Livestock, 109 I. C. C. 417 ... 26
Port of New York Authority v. Carriers, 144 I. C. C. 514 22
Proportional Class Rate Investigation, 100 I. C. C. 513 26
Railroad Commission of Kansas v. Carriers, 22 I. C. C. 407 16
Rates on Bunker Coal, 73 I. C. C. 62 16

Restrictions in Routing of Traffic from Pacific Northwest Points, 73 I. C. C. 305 22
Restrictions in Routing over S. L. & U. R. Co., 115 I. C. C. 357 22
Routing on Coal, etc., 66 I. C. C. 103 22
Skinner and Eddy v. U. S., 249 U. S. 557 10
Southern Kansas Grain Asso. v. Carriers, 139 I. C. C. 641 3
Southern Pacific Co. v. I. C. C., 200 U. S. 536 ..... 20, 21
Swift & Co. v. Dir. Gen., 66 I. C. C. 409 16
St. Louis Southwestern Ry. Co. v. U. S., 245 U. S. 136 19
Texas, etc. Ry. Co. v. Abilene etc. Co., 204 U. S. 426. 28
U. S. v. American Ry. Exp. Co., 265 U. S. 425 ... 20, 21, 31
U. S. v. Missouri Pacific Ry. Co., 73 L. Ed. 136 .... 21, 32
Van Dusen Harrington Co. v. Dir. Gen., 78 I. C. C. 729 25
Virginian Ry. Co. v. U. S., 272 U. S. 659 .... 19, 23, 24, 32
Wichita Board of Trade v. Carriers, 29 I. C. C. 376 .. 22
Wichita Chamber of Commerce v. Carriers, 109 I. C. C. 368 16

STATUTES CITED.

Interstate Commerce Act (24 Stat. 379) as amended by Transportation Act 1920 (41 Stat. 456):
Section 1 (5), (34 Stat. 584) 10
Section 15 (1), (41 Stat. 484) 10, 27
Section 15 (3), (41 Stat. 484) 20
Section 15 (4), (41 Stat. 484) 20
Section 15 (7), (41 Stat. 484) 9, 10
Section 15 (8), (41 Stat. 487) 3

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STATEMENT.

MAY IT PLEASE THE COURT:

The statement of facts appearing at pages 1 to 13 of the brief filed herein on behalf of appellants is substantially correct although there are certain inaccuracies and omissions to which we shall refer. These appellees were protestants before the Interstate Commerce Commission (R. 20) and intervened as parties defendant in the District Court (R. 33, 45, 46).

The Kansas City Southern Railway Company and its subsidiary, the Texarkana and Fort Smith Railway Company (hereinafter referred to as the Kansas City Southern) operate a line of railroad from the important grain market of Kansas City to Port Arthur, Texas, on the Gulf of Mexico. They publish and maintain from Kansas City to Port Arthur varying proportional or reshipping rates on grain and grain products for export, such as those described at page 6 of appellants' brief. They publish similar reshipping rates for export via Shreveport, La., in connection with the Southern Pacific Lines to Galveston, and via Shreveport in connection with the Louisiana Railway & Navigation Company and the Texas & Pacific Railway Company to New Orleans. None of appellants serve the port of Port Arthur.

The Chicago and Alton Railroad (hereinafter referred to as the Alton) extends eastward from Kansas City to St. Louis, where it connects with the Illinois Central Railroad, which in turn serves the port of New Orleans. Similar varying proportional or reshipping rates on grain for export are published by the Chicago & Alton for application on grain and grain products for export, from Kansas City to New Orleans via the route of the Chicago & Alton, St. Louis, and the Illinois Central. The Rock Island does not serve with its own rails either of the ports of Port Arthur or New Orleans. The Santa Fe does not serve with its own rails either the ports of Port Arthur or New Orleans, and the Missouri Pacific Railroad does not serve the port of Port Arthur.

The rate situation obtaining prior to 1924 with respect to grain shipped from origins in Kansas, Colorado and Nebraska, via Kansas City, for export through the gulf ports is set out in the illustration on page 3 of appellants' brief. The situation that obtained subsequent to the application via Kansas City of the direct rates of

ppellants', is set out in the illustration on page 5 of ppellants' brief. The situation which obtained subseuent to the publication of the so-called varying proporional rates of these appellees is set out in the illustraion on page 7 of appellants' brief, and this condition obains at this time.

The situation now is that the varying proportional ates published by these appellees and the St. Louis-San Francisco Railroad and Missouri-Kansas-Texas Raiload from Kansas City to gulf ports, applicable on exort grain originating on the lines of appellants in Kanas, Nebraska and Colorado, when added to the local ates of appellants on such grain inbound to Kansas ity, create an aggregate charge for the movement from he country origins to the gulf ports exactly equal in mount to the through rates of appellants from such ountry points to the same gulf ports with transit at ansas City. The varying proportional rates of these ppellees were permitted to become effective by the Inerstate Commerce Commission in the face of protests ade by appellants (R. 5) and are not in issue in this roceeding, either as to their volume or legality. Varyg proportional rates were approved by the Commission *Export Rates on Grain, etc.* 31 I. C. C. 616, and *Southrn Kansas Grain Assoc. v. Carriers*, 139 I. C. C. 641.

It is said at the bottom of page 2 of appellants' brief at the effect of the Commission's order was to shortaul appellants upon traffic originated by them and to quire them to participate in through routes and rough rates contrary to Interstate Commerce Act. his is an incorrect statement, and results from the pertent error of appellants in regarding the case as one hich involves routing. The case, as a matter of fact, in small compass. The only issue presented to the ommission was the propriety of the increased rates roposed in the suspended schedules of appellants.

On page 8 of their brief, appellants refer to the manner of handling the grain involved at Kansas City, and this feature of the case is deserving of consideration. As stated in the Commission's decision (R. 23), Kansas City has been one of the most important primary grain markets for many years. For many years it has been used as a storage point for grain shipped in from country points, and which grain is, for the most part, subsequently shipped to other destinations.

Because of this fact, almost every railroad at Kansas City has been at large expense to locate upon its rails elevators in which the grain coming into Kansas City from the country points of origin may be stored pending a decision by the purchaser and owner of it as to its ultimate destination. Thus, the Kansas City Southern has at large expense built two elevators upon its rails which are used for this purpose (R. 174). The Alton also has two similar elevators upon its rails (R. 211).

In its actual handling, the grain moves into Kansas City upon the line of the originating carrier. Upon reaching Kansas City, and perhaps prior thereto, it is sold. The purchased then requires the delivery of the car containing the grain to such elevator as is designated by him (R. 226). The grain is thereupon unloaded into the elevator, the car released and the charges on the inbound movement paid. At this point, the inbound movement is completely ended.

Thus, a car of grain may originate upon the Santa Fe Railroad in Kansas, move into Kansas City and be sold to a purchaser at that point, who may direct its delivery into the elevators upon the Kansas City Southern or Alton, where it is unloaded and the car released. In that case the switching charges of the Kansas City Southern or Alton are paid by the consignee at Kansas

City, and the Santa Fe receives its full local rate for the transportation to Kansas City (R. 176).

The grain thus comes to rest at Kansas City, changes ownership and may remain at rest for months before it is finally reshipped. During all of the time that it is at rest, no carrier, as a matter of fact, may be said to have any interest whatsoever in the outbound movement. This is necessarily so because at the time the grain moves into Kansas City, is purchased and unloaded into the elevator, no one, not even the purchaser, knows where it is going on the outbound movement. The ultimate destination is determined by developments which occur subsequent to the purchase and unloading of the grain at Kansas City. As a matter of fact, it completely loses its identity, and is shipped out on a proportional or reshipping rate only on the production of proof by the shipper that he has shipped an equal amount into Kansas City (R. 174-175, 227).

The Kansas City railroads, including these appellees, maintain elevator facilities on their rails at Kansas City to encourage an outbound movement over their rails, the theory of all roads being that every other road is at liberty to compete for the outbound movement. With respect to grain thus handled, it seems plain that the carrier hauling it into Kansas City loses all rights in it when the inbound movement is completed, the grain unloaded, the car released and the charges paid. It is true that for rate purposes, there is a fiction of a through movement from the country point of origin, via Kansas City, to the gulf port, but this is purely a fiction, and cannot alter the facts as to actual handling.

The map filed as an appendix to appellants' brief indicates that the Rock Island Railroad reaches the port of Galveston presumably because of some interest in the Trinity and Brazos Railway. On the hearing, however,

the Rock Island representative was unable to testify as to the extent of such interest, if any (R. 143). The map also shows that the Missouri Pacific Railroad reaches Galveston and New Orleans, presumably in connection with other lines under a common management and control (the International Great Northern Railroad and Texas and Pacific Railway), but the witness testifying on the point admitted that he did not know of his own knowledge the extent of the Missouri Pacific ownership in those companies (R. 122).

While certain increases in the grain rates via Wichita were proposed in the schedules filed by appellants, the rate situation, as stated by the Commission (R. 20), was and is the same on traffic via Wichita as on traffic via Kansas City. We shall confine this brief, therefore, to a discussion of the Kansas City situation, to which most of the evidence relates.

Opinions Below.

The opinion of the Interstate Commerce Commission in this case appears at 129 Interstate Commerce Commission Reports, page 261, under the title of *Grain and Grain Products from Colorado, Kansas and Nebraska to Gulf Ports for Export*. The entire opinion of the Commission, eliminating certain detail, appears at pages 13 to 17, inclusive, of appellants' brief, and is also found in the record (R. 19-24). It requires the cancellation of appellants' proposed tariffs.

The opinion of the United States District Court for the Northern District of Illinois is not yet officially reported. It is correctly set out, however, in its entirety, at pages 18 to 20, inclusive, of appellants' brief, and in the record (R. 54-58), and sustains the conclusions reached by the Commission.

SUMMARY OF ARGUMENT.

I.

The issue before the Commission was one involving the reasonableness and justness of proposed increased rates. The Commission, therefore, had jurisdiction, and its decision was correct.

II.

The case before the Commission did not involve any question of through routes or joint rates and consequently the order of the Commission did not deprive appellants of any rights reserved to them by paragraphs 3 and 4 of Section 15 of the Interstate Commerce Act.

(a) The filing of the suspended tariffs by appellants did not raise any issue of through routes or joint rates.

(b) The power of the Commission to deal with the proposed increased rates under Section 1 of the Interstate Commerce Act is not limited or destroyed by the provisions of paragraphs 3 and 4 of Section 15.

(c) In any event, appellants have received their long haul upon the traffic involved when it reaches Kansas City.

III.

The order of the Interstate Commerce Commission is not arbitrary and does not exceed the jurisdiction conferred upon the Commission.

ARGUMENT.

I.

THE ISSUE BEFORE THE COMMISSION WAS ONE INVOLVING THE REASONABLENESS AND JUSTNESS OF PROPOSED INCREASED RATES. THE COMMISSION, THEREFORE, HAD JURISDICTION, AND ITS DECISION WAS CORRECT.

The reasonableness and propriety of the rates contained in the proposed schedules filed by appellants is only referred to in appellants' brief in connection with a denial that that reasonableness and propriety was a proper subject for inquiry on the part of the Commission. Appellants' view on this subject is set out at page 49 of their brief, where it is said:

> "In I. & S. Docket No. 2813, the reasonableness of no rate was involved. The reasonableness of no rate charged any shipper or user of the railroad was involved. Upon this record there is no complaint as to the volume of the rate from any origin in Kansas, Nebraska or Colorado, to any gulf port."

And this was also the theory of the bill filed in the District Court. In paragraph XI of that bill, it is said (R. 12):

> "Plaintiffs further aver that the level of the inbound proportional rates was and is not material, because they were published not for the purpose of facilitating movement via the routes in connection with which they were published, but were published by plaintiffs to preclude and prevent movement via such routes * * *."

The undisputed facts are that at the time appellants' tariffs were filed, there were in effect upon grain shipped from points of origin on appellants' lines in Kansas, Nebraska and Colorado via Kansas City, to gulf ports for

export, rates which applied via appellants' lines to Kansas City and the lines of these appellants and of the St. Louis-San Francisco Railroad and Missouri-Kansas-Texas Railroad from Kansas City to the gulf ports. These rates were composed of appellants' local rates to Kansas City, plus the varying proportionals beyond, and their volume varied in amount, depending upon the point of origin. At the same time, rates equal in amount were in effect via Kansas City over appellants' lines from the same origins to the same destinations, being composed of appellants' local rates to Kansas City plus appellants' transit balances beyond.

In the suspended schedules, appellants published proportional rates from the local points of origin to Kansas City, for application only when the movement from Kansas City to the gulf ports was over the lines of these appellees, the St. Louis-San Francisco Railroad or Missouri-Texas Railroad, these proportionals being higher than the local rates between the same points by amounts ranging from ½c to 7½c per hundred pounds. These proportionals therefore increased the through rates on grain from the country origins via Kansas City to gulf ports, when the movement beyond Kansas City was over the lines of these appellees or the lines of the other two carriers named, by amounts ranging from ½c to 7½c per hundred pounds, depending upon the point of origin.

The proposals of appellants in the tariffs filed by them are illustrated on Exhibit 46 (fol. 648. Follows R. 472) offered in the hearings before the Commission. This exhibit plainly shows the increased rates proposed by appellants from representative points of origin. In the tariffs, nothing was proposed except these rate increases.

Paragraph 7 of Section 15 of the Interstate Commerce Act (41 Stat. 484) provides in part:

"Whenever there shall be filed with the Commis-

> sion any schedule stating a new, individual or joint rate, fare or charge * * * the Commission shall have and it is hereby given authority either upon complaint or upon its own initiative without complaint at once * * * to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation or practice."

Acting under this section of the law, the Commission suspended appellants' tariffs, held a hearing, and as a result of that hearing entered the order complained of. That it acted within its authority in suspending the tariffs and holding the hearings, cannot be denied. *Skinner & Eddy Corp.* v. *U. S.* 249 U. S. 557.

Paragraph 5 of Section 1 of the Interstate Commerce Act (34 Stat. 584) provides in part as follows:

> "All charges made for any service rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful * * *."

Paragraph 1 of Section 15 of the act (41 Stat. 484) provides in part as follows:

> "That whenever, after full hearing * * * the Commission shall be of opinion that any individual or joint rate, fare or charge whatsoever * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare or charge * * * to be observed in such case * * *."

Paragraph 7 of Section 15 of the Interstate Commerce Act, *supra*, provides in part:

> "At any hearing involving a rate, fare or charge increased after January 1, 1910, or of a rate, fare or charge sought to be increased after the passage

> of this Act, the burden of proof to show that the increased rate, fare or charge or proposed increased rate, fare or charge is just and reasonable shall be upon the carrier * * *"

Upon the hearing held by the Commission, no effort was made by appellants to meet the burden of proof cast upon them by paragraph 7 of Section 15 of the statute, and the record contains no evidence supporting the justness and reasonableness of the higher rates proposed. Appellants do not now claim and never have claimed that this proof was made by them.

Under these circumstances, the only proper order the Commission could make was one requiring the cancellation of the proposed tariffs. The statute required such a disposition of the case. The law gave the Commission the right to suspend the proposed tariffs and hold the hearing. It prohibited the collection of the proposed increased charges unless they were just and reasonable, imposed upon appellants the burden of proving that they were just and reasonable, and gave the Commission power to require their cancellation if the proof was not made. Appellants do not claim that they made this proof. It necessarily follows that the Commission's order was right.

This conclusion follows, no matter whether the proposed increases be considered as increases in local rates from the country points of origin to Kansas City or in the through rates from the country point of origin to the Gulf port, via Kansas City. All are rates subject to the jurisdiction of the Commission.

The proposed rates of appellants were published as proportionals to apply in connection with the movement of the grain by certain specified lines of railroad from Kansas City to Gulf ports and as such they were part of the through interstate rate. In *Hocking Valley Rail-*

way Co. v. *Lackawanna Coal, etc. Co.* 224 Fed. 930, the Circuit Court of Appeals for the Fourth Circuit, in describing a proportional rate said at page 931:

> "A 'proportional rate,' as the term implies, is simply a part of a through rate. It is the share of the aggregate charge from origin to destination which one or more of the carriers accepts for performing a definite portion of the whole transportation service. It is a matter of common knowledge that through rates are generally less than the sum of intermediate local rates; and when all the participating carriers do not join in establishing the through rates, it is a common practice for one or more of them to name proportional rates up to some point of connection with another carrier which completes or continues the transportation."

Although such a proportional rate as is described in the foregoing case is a part of a through rate, it is nevertheless true that the Commission in dealing with rates of this character has authority to deal with them standing alone. Thus, in *Basing Rates on Paving Brick*, 100 I. C. C. 380, respondents attempted to increase the proportional rates south of Jacksonville, Florida, to the same extent that proportional rates north thereof had been reduced. They attempted to justify the proposed rates by justifying the through charges, which had not been changed, but the Commission held that the burden was upon respondents to justify the suspended increased proportional rates since those were the rates in issue.

So also in *Atchison Board of Trade* v. *Carriers*, 80 I. C. C. 350, the propriety of separately considering the proportional rates from the Missouri River was upheld, citing *Cairo Board of Trade* v. *Carriers*, 46 I. C. C. 343. On this point see also *Petroleum and Petroleum Products*, 78 I. C. C. 162. And in the *Hocking Valley Railway Co.* case, *supra*, the court said at page 931:

> "The propriety and lawfulness of proportional

rates to the point of transfer which are less than local rates to that point have frequently been affirmed by the Interstate Commerce Commission, and are sanctioned by considerations of public policy. *Kansas City Transportation Bureau* v. *A. T. & S. F. Ry. Co.* 16 Interst. Com. Comm. R. 195, 201; *Southwestern Shippers' Traffic Association* v. *A. T. & S. F. Ry. Co.* 24 Interst. Com. Comm. R. 570, 578; *Boney & Parker Milling Co.* v. *A. C. L. R. Co.* 28 Interst. Com. Comm. R. 383, 388."

Appellants' claim that the reasonableness of no rate was involved in the case is but a gesture. Increases were proposed in the rates from the country origins to Kansas City and the same increases were proposed in existing through rates, made by combination via Kansas City. Various railroads and shippers objected to these proposed increases, resulting in the suspension of the tariffs. The burden of justifying the increases was cast upon appellants by the terms of the statute, and they do not claim that they made the required proof. The necessary conclusion is that the Commission's decision was right and should be sustained.

Other circumstances confirm the propriety of the Commission's decision. The only carrier involved in this case and serving the port of Port Arthur is the Kansas City Southern. None of the appellant carriers serve this port with their own rails. The port has been fully developed at large expense (R. 171), and there is no reason why it should not be used. The effect of the tariffs promulgated by appellants would have been to increase the rates on all grain from points on appellants' lines moving via Kansas City to Port Arthur for export to such an extent that that port would have been left with no rates on export grain from any points on appellants' railroads in Kansas, Nebraska and Colorado which would be on a competitive basis with those main-

tained to Houston and Galveston from the same points of origin. (R. 172, 173.)

For example, the present combination through rate from Dodge City, Kansas, to Port Arthur via Kansas City and the Kansas City Southern is 47c per hundred pounds, whereas under the proposed schedules this charge would become 51c. The rate from Dodge City via Kansas City to the competitive port of Galveston by appellants' own routes would remain unchanged at 47c per hundred pounds. It thus appears that had appellants been permitted to make their proposed tariffs effective, they would have automatically increased, by substantial amounts, the rates on export grain from country points of origin in the states named moving via Kansas City to Port Arthur, Texas, a destination not served by any of them.

It is insisted on behalf of appellants that even through the through rates via the lines of the Kansas City Southern, Chicago & Alton, St. Louis-San Francisco and Missouri-Kansas-Texas are increased, there is still no increase in rates, since shippers desiring to move grain from origins on appellants' lines in Kansas, Colorado and Nebraska, via Kansas City to the Gulf for export may still use the rails of appellants from Kansas City at no increase. Giving this argument all the effect contended for it by appellants, it is still not true as to Port Arthur, which has no competitive basis of export rates except via the Kansas City Southern and is not served by any of appellants.

Nor can it be assumed that the higher through rates over lines other than those of appellants would drive all the outbound traffic from Kansas City to appellants' rails. That this would happen is not proven on the record and it may not be inferred. It is reasonably certain

that some traffic would continue to move over routes carrying the higher rates, and if appellants' theories are correct, such traffic would have to pay charges, the reasonableness of which had not been proven as required by the statute.

Moreover, so far as other Gulf ports are concerned, the proposed increases in rates via the lines of carriers other than appellees cannot be justified. The Kansas City Southern has the shortest route from Kansas City to the Gulf of Mexico, and the routes via the Chicago & Alton are not unreasonably long. As stated in the opinion of the Commission (R. 23):

> "The routes via Kansas City over which the proposed inbound proportional rates would increase the through charges are in many instances shorter than the routes via that point over which rates would not be increased."

This situation in itself is a sufficient reason for condemning the proposed tariffs.

Another consideration justifying the Commission's conclusions is that appellants' proposed proportional rates are higher than the local rates assessed for the same service. It was conceded by appellants' witness (R. 108) that the service to be performed by appellants in hauling the grain from the country origins to Kansas City would be the same under the present local rates and the proposed proportional rates. That the proposed proportional rates would be higher than the local rates is clearly shown on Exhibits 43, 44 and 45 (R. 470, 471) introduced on the hearing before the Commission. For example, from Dodge City, Kansas to Kansas City, appellants proposed a proportional rate of 24.5c, which was to apply, however, only when the outbound move from Kansas City was over the lines of these appellees or the St. Louis-San Francisco or Mis-

souri-Kansas-Texas. For exactly the same service, over the same rails between the same points, they proposed to continue the local rate of 20.5c.

This is contrary to the natural order of things, for a proportional rate is always normally less than a local rate between the same points. *Hocking Valley Ry. Co.* v. *Lackawanna, etc. Co. supra; Railroad Com. of Kansas* v. *Carriers*, 22 I. C. C. 407; *Swift & Co.* v. *Dir. Gen.* 66 I. C. C. 409; *Lumber from San Francisco Bay Points*, 78 I. C. C. 760; *Rates on Bunker Coal*, 73 I. C. C. 62; *Kansas City Board of Trade* v. *Carriers*, 69 I. C. C. 185; *Wichita Chamber of Commerce* v. *Carriers*, 109 I. C. C. 368. All of the witnesses who testified on the point before the Commission also said that this was so. (R. 153, 157, 159, 160.)

In view of the foregoing, the order of the Commission and the judgment of the District Court should be upheld. To hold otherwise is to deprive the Commission of jurisdiction over the reasonableness and justness of the proposed rates; relieve appellants of a duty cast upon them by statute, and approve the application upon at least some volume of traffic of rates which the Commission, in the exercise of its undoubted jurisdiction, has disapproved.

II.

THE CASE BEFORE THE COMMISSION DID NOT INVOLVE ANY QUESTION OF THROUGH ROUTES OR JOINT RATES, AND CONSEQUENTLY THE ORDER OF THE COMMISSION DID NOT DEPRIVE APPELLANTS OF ANY RIGHTS RESERVED TO THEM BY PARAGRAPHS 3 AND 4 OF SECTION 15 OF THE INTERSTATE COMMERCE ACT.

(a) *The filing of the suspended tariffs by appellants did not raise any issue of through routes or joint rates.*

Consistent with the position taken by them before the Interstate Commerce Commission and the District Court, appellants have confined their argument in this court to the proposition that the tariffs filed by them and ordered canceled by the Commission, in some manner proposed changes in routes and routing, and that the order of the Commission as sustained by the District Court deprived them of rights conferred upon them under paragraphs 3 and 4 of Section 15 of the Interstate Commerce Act. With one exception, all of the errors assigned by appellants (pages 21 to 23 inclusive, appellant's brief) relate to the alleged error of the Commission in refusing to deal with the case as one involving routes and routing. Except for a claim that the Commission's order was made without competent evidence to support it, the summary of argument (page 24, appellant's brief) and the argument (pages 25 *et seq.*, appellants' brief) deal only with this proposition. The position of appellants in this case is thus stated at page 32 of their brief:

> "The action of respondents in publishing the inbound varying proportional rates suspended herein was an exercise of their undoubted right to preserve to themselves the long haul upon traffic originated upon their lines and their right to so protect themselves should not be abridged."

Again, at page 35 of their brief, it is said:

> "The Interstate Commerce Commission entirely ignored the right of appellants to withdraw their participation in such routes and ignored the many findings of the Commission to the effect that its right to require the continuance of existing rates and routes does not exist in cases where it could not have initiated such routes originally."

A similar claim is made in paragraph XIV of the bill filed in the District Court (R. 15), and this position of appellants' was referred to in the Commission's decision. (R. 22.)

Stated briefly, appellants' position seems to be that the movement of this grain is a through movement from the country point of origin to the Gulf port; that since they haul the grain into Kansas City, they have an absolute right to haul it out; that they may protect this right by withdrawing from through routes and through rates which now exist; and that they have undertaken to so withdraw through the medium of the suspended tariffs, which increase the rates on shipments moving from Kansas City over the lines of these appellees, the St. Louis-San Francisco Railroad and Missouri-Kansas-Texas Railroad.

In order that full justice may be done the claims made by appellants, it is necessary to remember that the tariffs which were required to be canceled by the order of the Commission said nothing whatsoever about through routes or joint or through rates. The proceeding before the Commission was not an effort on the part of anybody to secure an order requiring appellants to establish through routes or become parties to joint or through rates to be applied over those routes. Nor does the order of the Commission make any requirement whatsoever with respect to either the maintenance of through

routes and rates by appellants or their withdrawal therefrom. All the Commission did was to hold not justified, the increased rates proposed by appellants.

For many years, through routes on grain have existed from points of origin in Kansas, Colorado and Nebraska via Kansas City to the Gulf ports, these routes being via the lines of appellants to Kansas City and from Kansas City to the Gulf ports over the lines of these appellees and practically all other railroads which reached Kansas City. Joint rates did not apply over these routes, but through rates did apply over all of them, those rates being made by combinations of local and proportional rates or combinations of locals into Kansas City and the so-called transit balances from Kansas City to the Gulf ports. On this subject, the Commission said in its decision in this case (R. 22, 23):

> "We cannot agree with respondents that through routes over their lines to Kansas City in connection with the lines maintaining the varying proportionals beyond do not now exist. For many years, Kansas City has been one of the most important primary grain markets, and the rates through that market generally have been combinations of rates to and from that point."

Under these circumstances it cannot be denied that through routes and through rates existed and now exist. *St. L. S. W. Ry. Co.* v. *U. S.* 245 U. S. 136; *Central R. R. etc.* v. *U. S.* 257 U. S. 247; *Virginian Ry.* v. *U. S.* 272 U. S. 658. The purpose of appellants in attempting to make the higher proportional rates effective is stated in paragraph VIII of the bill filed in the District Court (R. 9), and in paragraph XI (R. 12, 13), where it is said that the proposed rates were published—

> "not for the purpose of facilitating movement via the routes in connection with which they were published, but were published by plaintiffs to preclude the prevent movement via such routes * * *"

Prior to 1906, the Commission had no power to establish through routes. *So. Pac. Co.* v. *I. C. C.* 200 U. S. 536. Through amendments of June 29, 1906 (34 Stat. 584, 590), June 18, 1910 (36 Stat. 539, 552) and February 28, 1920 (41 Stat. 456), the law on the subject of the power of the Commission over through routes and joint rates was brought to its present form. In *U. S.* v. *American Ry. Exp. Co.* 265 U. S. 425, these changes in the law were reviewed. (See note, p. 430.) Paragraphs 3 and 4 of Section 15 of the Interstate Commerce Act (41 Stat. 484) now relied upon by plaintiffs read in part as follows:

> "(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, * * *.
>
> (4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established; * * *."

It is apparent that the provisions of paragraph 4 merely constitute a limitation upon the power conferred upon the Commission by the provisions of paragraph 3. This is clearly indicated by the use of the phrase "any such through route," and also by the fact that the provisions now appearing in paragraphs 3 and 4 of Section 15 of the Interstate Commerce Act appeared in a single

paragraph in the amendment of June 18, 1910, which is set forth at pages 28 and 29 of appellants' brief. This court has held that paragraph 4 is only a limitation upon paragraph 3. In *United States* v. *American Railway Express Company, supra,* it was said at pages 430, 431:

> "The power to establish through routes is conferred broadly as to all carriers by paragraph 3 of Section 15. The limitation upon the power in respect to a 'carrier by railroad' is imposed by paragraph 4 * * *."

In *United States* v. *Missouri Pacific R. R. Co.*, decided January 2, 1929 (73 L. Ed. 136), this court said:

> "The general language of paragraph (3) is limited by paragraph (4)."

In support of their argument, appellants have referred to a few decisions of this court and many decisions of the Interstate Commerce Commission, none of which, however, have any bearing on the issue here. The *East Tenn. Ry. Company case*, 47 Fed. 771, the *Southern Pacific Company case*, 200 U. S. 536, and the *Northern Pacific Railway Co. case*, 216 U. S. 538, were all decided under a decidedly different law than is now in effect.

The case of *U. S.* v. *Missouri Pacific Railroad Co.*, decided by this court January 2, 1929 (73 Law Ed. 136), did involve a construction of paragraphs 3 and 4 of Section 15 as they now stand, but is not in point. In that case the order was made by the Commission on a complaint filed by the Fort Smith, Subiaco and Rock Island Railroad Company with the Interstate Commerce Commission, in which the Commission was requested to establish through routes over the Subiaco line and joint rates in connection therewith. No such request has been made by any party to this case, and the order of the Commission does not require either the establishment of through routes and joint rates by appellants or the con-

tinuance of such routes and rates in the face of an effort to eliminate them.

In all of the cases decided by the Commission, and cited in appellant's brief, the orders of the Commission were made upon petitions requesting the establishment of through routes and joint rates in cases where such through routes and joint rates did not theretofore exist, or were proposals by carriers to close through routes and cancel joint rates which were then in existence.

Thus, in the *Wichita Board of Trade case*, 29 I. C. C. 376 (p. 33, appellant's brief), the *Lemon-Cove-Woodlake Association case*, 139 I. C. C. 239 (p. 46, appellant's brief), and the *Port of New York Authority case*, 144 I. C. C. 514 (p. 46, appellant's brief), the petitions to the Commission specifically asked for the establishment of through routes and/or joint rates. In the *Ogden Gateway case*, 35 I. C. C. 131 (p. 35, appellant's brief), *Restriction in Routing of Traffic from Pacific Northwest Points*, 73 I. C. C. 305 (p. 38, appellant's brief), *Routing on Coal, etc.* 66 I. C. C. 103 (p. 38, appellant's brief), and *Restrictions in Routing over S. L. & U. R. R.* 115 I. C. C. 357 (p. 40, appellant's brief), all the proposals made made were to either cancel or limit the application of joint rates over through routes then in existence.

The distinction between such cases as these and the case at bar is obvious. Here we have no complaint by anybody asking for the establishment of joint rates on grain from origins in Kansas, Colorado and Nebraska on the lines of appellants, via Kansas City, in connection with other carriers, to Gulf ports for export. The order of the Commission does not require the establishment of such joint rates. There has been no request by appellants through the medium of the suspended schedules that existing joint rates covering the transportation of

such traffic over such routes be canceled. Nor do we have any effort by appellants to cancel through routes.

On the contrary, there is in the suspended schedules a proposal that through routes and through rates by combination be continued on the traffic in question via the lines of appellants and those of these appellees, since the suspended schedules propose proportional rates for specific application in connection with the movement of grain from points on appellants' lines in Kansas, Colorado and Nebraska to Kansas City and from Kansas City to Gulf ports for export over the lines of these appellees. These facts bring this case squarely within the decision of this court in *Virginian Ry. Co.* v. *U. S.* 272 U. S. 658.

In that case the through rates in question were combination rates to and from a junction. The Commission entered an order requiring them to be reduced. The Virginian Railroad attacked the order in court, contending, in substance, that the reduction in the combination rates over the routes in question would short-haul it by diverting the movement of coal from mines on its lines to destinations where the Virginian would not get as long a haul as it would get if the coal were going to other destinations.

In other words, the Virginian attempted to retain to its rails the longest possible haul on the coal involved by granting to such hauls a through rate less than the through rates that applied on the same coal if hauled to other destinations where the haul of the Virginian was substantially less. This is precisely the situation presented here. Through rates by combination were and are now in effect via the lines of appellants and these appellees via Kansas City. The announced purpose of appellants in publishing the increased proportionals was

to increase the through rates via the lines of these appellees so as to divert to their rails, on the outbound movement from Kansas City to the gulf ports, traffic which might otherwise move from Kansas City over the lines of these appellees.

The Virginian also contended that its rights under paragraph 3 of Section 15 of the Interstate Commerce Act, were violated by the ordered reduction in the combination through rates, just as appellants here contend that their rights under the same provision of the law, are violated by the refusal of the Commission to permit them to maintain these higher proportionals when the outbound movement from Kansas City is over other railroads. This court said in the *Virginian case*, at page 666:

> "But the order here in question was not sought or made under Section 15 (3) and does not direct the establishment of through routes and joint rates. Through routes to the West were already in existence. And there were through rates by combination." (Citing cases.)

This is exactly the situation presented in the case at bar, as the order of the Commission does not direct the establishment of through routes and joint rates, nor do the suspended tariffs of appellants propose the cancellation of through routes and joint rates. Through routes and joint rates by combination have existed via Kansas City for many years and would still be in existence, had the suspended tariffs been permitted to become effective. On this point the Commission said in its decision (R. 23):

> "There is no question in our minds but that there have been and are at least implied arrangements for the through carriage of this traffic sufficient to constitute all of these routes through routes within the meaning of the Act, and their status would not be affected by the suspended inbound proportionals here considered."

Referring to the powers of the Commission, this court said in the *Virginian case*, at page 667:

> "The order was sought and made under Section 1 and Section 3. Section 15 (3) does not require that the Commission must make a special finding of public interest, before it can prescribe how an existing through rate found to be unreasonable and discriminatory shall be made conformable to law."

At pages 50 *et seq.* of their brief appellants take the position that the proposed continuance of through rates and routes under the suspended schedules is of no importance. It is claimed that their intention of diverting traffic to their lines through the medium of higher rates over competing lines in some manner justifies the higher rates. Such an argument is difficult to follow. What appellants' intentions were is not important. What they did is the thing for consideration. They are now in the position of having increased rates, failed to justify the increases as required by law and of asking this court to approve their action because of their motive. Even if they were entitled to the outbound haul from Kansas City as a matter of law, such an argument would fail, for it nowhere appears that all traffic would move over appellants' rails if the suspended schedules became effective, and this fact cannot be assumed.

It is also claimed that the Commission had no jurisdiction over the level of the proposed rates because it had no authority to require joint rates via the lines of appellants and these appellees.

This contention must be based upon the theory that combination through rates are invested with the character of joint through rates. Clearly this is not so. In *Van Dusen Harrington Co.* v. *Director General*, 78 I. C. C. 729, the Interstate Commerce Commission said at page 731:

> "The fact that the combination through rates were

> composed of proportional factors, the use of each of which was dependent upon the use of the other factor or factors, did not, as complainant seems to infer, invest them with the character of joint through rates."

This case was cited with approval in *Proportional Rates on Livestock*, 109 I. C. C. 417, at page 424. See also *Proportional Class Rate Investigation*, 100 I. C. C. 513, where the Commission said at page 682:

> "By refusing to concur they made sure of their local rates for the haul to the ports. As participants in joint rates they would be entitled only to divisions, which might or might not equal the local rates."

The authority of the Commission to require joint through rates via these routes need not be discussed, as it is not an issue. On the subject of the Commission's authority over through rates by combination, the *Virginian case*, *supra*, is a complete answer to appellant's argument.

In both the *Virginian case* and the case at bar, there were through routes in existence, and through rates by combination applied over those routes. In the *Virginian case* the railroad attacked the Commission's order requiring a reduction in the combination through rates, alleging that the reduced rates would divert traffic to a route which would short-haul the Virginian in violation of its legal rights. In this case, appellants attack the order of the Commission under a claim that the refusal of the Commission to permit the higher rates over competing routes will short-haul them in violation of their legal rights. The analogy is complete.

(b) *The power of the Commission to deal with the proposed increased rates under Sections* 1 *and* 15 *of the Interstate Commerce Act is not limited or destroyed by the provisions of paragraphs* 3 *and* 4 *of Section* 15.

Appellants' claim, in effect, is that the Commission had no jurisdiction over the justness and reasonableness of the proposed rates because the purpose of appellants in publishing them was to divert traffic to their own rails. The point is thus set out at page 51 of appellants' brief:

> "As the routes and rates established partly by the action of appellants in publishing varying inbound proportional rates are routes and rates which could not be established by the Commission in the first instance * * *, the Commission is without jurisdiction over the volume of rates via such routes."

To give effect to such a legal theory would practically destroy the jurisdiction of the Commission to determine the reasonableness and justness of railroad rates. Almost every voluntary rate change on a railroad is made for the purpose of either attracting traffic to that railroad or of diverting it from other railroads. Within certain limits, this is recognized as a legitimate means of securing traffic, but we have never heard it contended that the Commission is deprived of its jurisdiction if the purpose of a carrier in making a rate change is to secure traffic.

The Commission not only has power to prohibit the imposition of rates that are so high as to be unreasonable but also to prohibit the granting by a carrier of rates so low as to be improper (Sec. 15 (1) Interstate Commerce Act, *supra*). Yet, if appellants be right in their contention, the jurisdiction of the Commission over increased or reduced rates will be defeated if the purpose of the rate change is to divert traffic from competing

lines. Such a destruction of the recognized authority of the Commission should not be countenanced.

In *Texas & Pacific Railroad Co.* v. *Abilene, etc. Co.*, 204 U. S. 426, this court passed upon the claim that in so far as Section 22 of the Interstate Commerce Act preserved then existing common law remedies, it constituted an express limitation upon the exclusive jurisdiction of the Commission over railroad rates. Referring to that Section of the Act, this court said at page 446:

> "This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself."

This language has a strong application to the case at bar, for we submit that appellants' construction of the rights conferred upon them under paragraphs 3 and 4 of Section 15 of the Interstate Commerce Act may be upheld, as by so doing this court would be destroying Sections 1 and 15 (1) of the same law.

And in *Nashville, etc. Ry.* v. *Tennessee*, 262 U. S. 318, this court passed upon the effect to be given that language of Section 22 of the Act permitting free or reduced rate transportation under certain circumstances, as constituting a limitation upon the jurisdiction of the Commission over the reasonableness and propriety of intrastate rates, saying at page 323:

> "Section 22 must in this matter, as in others, be read in connection with the rest of the act, and be interpreted with due regard to its manifest purpose. *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506, 511. Congress did not intend, by this provision concerning reduced rates and free transportation, to create an instrument, by which the carrier was authorized, in its discretion, to subject interstate commerce to undue prejudice, or by which the State was empowered to compel the carriers so to do."

We submit that the same rule of construction should be used in the case at bar. The rights of a carrier under the through route and joint rate provisions of Section 15 must be determined after a consideration of the manifest purpose of the whole law. By protecting the long haul of a carrier under certain conditions, Congress certainly did not mean to create an instrument by which that carrier would be free to impose unjust and unreasonable rates upon such shippers as chose to ship their freight over other railroads.

Paragraphs 3 and 4 of Section 15 of the Act gives the Commission the right to establish through routes and joint rates thereover, if it does not require a railroad, without its consent, to embrace in such through route substantially less than the entire length of its railroad. In this case no joint rates are involved, and through routes have existed for many years and exist now. Nothing is involved here except the desire of appellants to force as much of the traffic as possible to move over their own rails, by increasing [illegible]e rates over the rails of competing carriers. To maintain their position, they are driven to rely upon a construction of paragraphs 3 and 4 of Section 15 which completely emasculates Sections 1 and 15 (1). We submit that such a construction of the law should be approved.

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(c) *In any event, appellants have received their long haul upon the traffic involved when it reaches Kansas City.*

Even if appellants are entitled to the protection of the long haul upon traffic originated by them, we submit that when the grain involved in this case reaches Kansas City, appellants have had the benefit of the only haul as to which they have the protection of the law. The grain

and grain products upon which appellants' proposed rates would apply, now move into Kansas City under local rates. At that time no one knows the final destination of that traffic. Upon reaching Kansas City the grain ordinarily changes ownership and is placed in elevators or receives some other treatment, in accordance with the provisions of applicable transit circulars. (R. 176, 177.) When the originating line has delivered up the grain to the consignee at Kansas City it has performed all the transportation service which it contracted to furnish under the original bill of lading. Its liability as a carrier ceases and does not again arise unless the grain comes back into its possession.

If grain comes into Kansas City and is stored in an elevator upon the tracks of the inbound carrier, the elevator operator on that line will not ordinarily attempt to move the grain out of Kansas City for export via a route other than that of the inbound carrier. But in many instances the grain will move into Kansas City via one railroad, and for one reason or another, be stored in an elevator upon another railroad. The inbound carrier moves the grain into Kansas City, delivers the shipment to its connection at the ordinary place of interchange, and its connection delivers the grain to the elevator. The inbound carrier receives its local rate and the delivering carrier its switching charge. On the inbound movement of the grain the inbound carrier does not absorb the switching charge of the terminal line. The outbound carrier absorbs all switching charges when the grain is reshipped for export. (R. 177-8.)

In such instances the inbound carrier relinquishes all possession and control of the grain when it delivers the cars containing it to its connection at Kansas City, and if the movement outbound is via the routes of these

appellees, the inbound carrier does not regain possession of the shipment when it is reshipped to the Gulf ports. If any carrier is entitled to hold the grain to its own rails for the long haul outbound from Kansas City thereafter, it is the outbound line at Kansas City and not the inbound line.

It is true that for rate purposes, there is a fiction of a through movement via Kansas City, but this fiction, indulged in solely for the purpose of permitting transit at Kansas City at less than the combination of local rates, does not confer any legal rights upon appellants under paragraphs 3 and 4 of Section 15 of the Interstate Commerce Act. Appellants' claim to the outbound haul must rest upon some connection between the inbound and outbound hauls, and as a matter of fact, there is no such connection.

When the grain has come to rest at Kansas City, the originating carrier has received its long haul within the meaning of Section 15 (4), and it is not entitled to a further haul upon the shipment unless the new owner of the grain at Kansas City voluntarily routes the outbound shipment via its line. This is the only conclusion consistent with the facts that the inbound movement and the liability of the carrier with respect thereto has completely terminated; that the inbound carrier has received its full local rate for the service performed by it and that the grain may never move beyond Kansas City, or that if it does move beyond, it may move to a destination not served by the inbound carrier. It is difficult to understand how the inbound carrier retains a legal right to the outbound haul after its legal obligations on the inbound movement have been completely discharged.

In *U. S. v. American Express Co., supra,* this court said at page 437, that the Express Company had

no absolute right to retain traffic which it originated, and this is so of appellants with respect to the grain traffic here involved. Such a right, if confirmed in appellants, would deprive Kansas City shippers of the right to route their freight, a right granted them under paragraph 8 of Section 15 of the Interstate Commerce Act (41 Stat. 487), (*U. S.* v. *American Express Co., supra*), or compel them to pay a penalty in the form of a higher rate if they did exercise their right.

This court held in the recent case of *United States* v. *Missouri Pacific R. Co., supra*, that the protection of the long haul afforded by paragraph (4) of Section 15 was not only reserved to the originating railroad but also to the destination railroad. Therefore, even if the provisions of that paragraph did apply in the present case, these appellees surely have the same right to the protection of their long haul from Kansas City as have appellants, and this right can only be preserved to them by permitting them to compete for the outbound movement from Kansas City on the same basis as appellants.

III.

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION IS NOT ARBITRARY AND DOES NOT EXCEED THE JURISDICTION CONFERRED UPON THE COMMISSION.

Since it is clear that the Interstate Commerce Commission did not exceed its statutory power in entering the order attacked, this court will not undertake to pass upon the propriety of that order.

In *Virginian Ry. Co.* v. *United States, supra*, the court said, at page 665:

> "The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal

'informed by experience.' *Illinois Central R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454. This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it."

In *Assigned Car Cases*, 274 U. S. 564, the court said, at page 580:

> "There was ample evidence to support the Commission's findings. It is not for courts to weigh the evidence introduced before the Commission, *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268, 271, 46 S. Ct. 500, 70 L. Ed. 941; or to inquire into the soundness of the reasoning by which its conclusions are reached, *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 471, 30 S. Ct., 155, 54 L. Ed. 280; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562, 39 S. Ct. 375, 63 L. Ed. 772; or to question the wisdom of regulations which it prescribes, *United States* v. *New River Co.*, 265 U. S. 533, 542, 44 S. Ct. 610, 68 L. Ed. 1165. These are matters left by Congress to the administrative 'tribunal appointed by law and informed by experience.' *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454, 27 S. Ct. 700, 704 (51 L. Ed. 1128)."

Even if the question determined by the Commission is one of mixed law and fact the courts will not substitute their judgment for that of the Commission. In *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, the court said, at page 547:

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling."

Appellants refer to an alleged inconsistency between the Commission's decision in this case and its decision

in *Grain and Grain Products, etc.*, 115 I. C. C. 153. Even if the inconsistency exists, it is of no importance. *Virginian Ry. Co.* v. *U. S., supra.* And in *Grain and Grain Products, etc., supra,* the Commission did not condemn the varying proportionals of these appellees. On the contrary, those varying proportionals were then in effect, having been allowed to become effective over the protest of appellants. (Appellants' Brief, p. 7.)

Conclusion.

The only issue involved in this case is the propriety of the Commission's conclusion that the higher rates proposed have not been justified as required by law. No effort was made by appellants to so justify them, nor is there any claim made that they have been so justified. Paragraphs 3 and 4 of Section 15 of the Interstate Commerce Act are not involved, since there is no issue of through routes or joint or through rates in the case. We submit that the order of the Commission is right, and that the judgment of the District Court should be affirmed.

Respectfully submitted,

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